

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Decisions)



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PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), and the Virus-Serum-Toxin Act of 1918 (21 U.S.C. 151-158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

Current court decisions involving the regulatory laws administered by the Department of Agriculture are published herein.

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A list of decisions reported and a subject index are published in each issue of Agriculture Decisions. A list of decisions reported and a subject index for the entire volume or calendar year are published in the November-December issue.

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In re: JOHNNY DOBSON, LARRY FREELAND and SPEEDWAY TRANSPORTATION, INC. A.Q. Docket No. 168. Decided July 8, 1985.

Cattle moved interstate—Civil penalty—Consent.

Kris Ikejiri, for complainant.

John E. Dier, Holdrege, Nebraska, for respondent, Speedway Transportation, Inc.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION AND ORDER AS TO SPEEDWAY TRANSPORTATION, INC.

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. § 111 and § 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, alleging that Johnny Dobson, Larry Freeland, and Speedway Transportation, Inc., violated the Act and regulations promulgated thereunder (9 CFR § 71.1 *et seq.* and 78.8 *et seq.*). Respondent Speedway Transportation, Inc., and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondent Speedway Transportation, Inc., admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Speedway Transportation, Inc., also stipulates and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et. seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Speedway Transportation, Inc., respondent herein, is a company doing business in Nebraska, whose address is Rural Route 2, Holdrege, Nebraska 68949.

2. On or about August 1, 1984, the respondent with others moved interstate from Sulphur Springs, Texas to Alma, Nebraska, approximately 44 cattle.

CONCLUSION

Respondent Speedway Transportation, Inc., having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Speedway Transportation, Inc., is hereby assessed a civil penalty of seven hundred and fifty dollars (\$750.00) which shall be payable to the "Treasurer of the United States" by check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This Order shall become effective upon service of the respondent.

In re: Ross POTTER. A.Q. Docket No. 147. Decided July 9, 1985.

Cattle moved interstate—Civil penalty—Consent.

Sally Stratmoen, for complainant

Gail Inman-Campbell, Harrison, Arkansas, for respondent

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1908, as amended (Act) (21 U.S.C. § 111, 120, and 122) (Act) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent has violated sections 111 and 120 of the Act (21 U.S.C. §§ 111, and 120) and the regulations promulgated thereunder (9 CFR §§ 71.18 and 78.1 *et seq.*) The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits or denies the remaining al-

legations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the proceeding.

FINDINGS OF FACT

1. Ross Potter, herein referred to as the respondent, is an individual whose address is Route 2, Harrison, Arkansas 72106.

2. On or about August 11, 1983, the respondent moved twelve (12) cows interstate from Green Forest, Arkansas to Springfield, Missouri.

3. On or about August 14, 1983, the respondent moved thirteen (13) cows interstate from Green Forest, Arkansas to Springfield, Missouri.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding with respect to respondent Ross Potter, such order and decision shall be issued.

ORDER

The respondent is accessed a civil penalty of two hundred dollars (\$200.00). The respondent shall send a certified check or money order for \$200.00 payable to the "Treasurer of the United States," to Sally Ogelby Stratmoen, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: BILL PRICE, A.Q. Docket No. 95. Order issued July 10, 1985.

Order issued by William J. Weber, Administrative Law Judge.

ORDER OF DISMISSAL

Complainant has filed a Motion to Dismiss on the ground that formal adjudication is not necessary in order to effectuate the purposes of the program.

IT SHOULD BE AND HEREBY IS ORDERED that the Complaint is dismissed without prejudice.

In re: JOHNNY DOBSON, LARRY FREELAND, and SPEEDWAY TRANSPORTATION, INC. A.Q. Docket No. 168. Decided July 18, 1985.

Cattle moved interstate—Civil penalty—Consent.

Kris Ikejiri, for complainant.

Respondent Johnny Dobson, pro se.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION AND ORDER AS TO JOHNNY DOBSON

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. § 111 and § 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Johnny Dobson, Larry Freeland, and Speedway Transportation, Inc., violated the Act and regulations promulgated thereunder (9 CFR § 71.1 and § 78.1 *et seq.*). Respondent Johnny Dobson and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Johnny Dobson admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Johnny Dobson also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by Johnny Dobson in connection with this proceeding.

FINDINGS OF FACT

1. Johnny Dobson, respondent herein, is an individual whose address is Route 4, Sulphur Springs, Texas 75482.

2. On or about August 1, 1984, the respondent, with others, moved interstate from Sulphur Springs, Texas to Alma, Nebraska, approximately 44 cattle.

CONCLUSIONS

Respondent Johnny Dobson having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

Respondent Johnny Dobson is assessed a civil penalty of seven hundred and fifty dollars (\$750.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be awarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This Order shall become effective upon service upon the respondent.

In re: GEORGE HEATH. A.Q. Docket No. 51. Decided July 19, 1985.

Cattle moved interstate—Civil penalty—Consent.

Jaru Ruley, for complainant.

Lawerence E. Long, Martin, South Dakota, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspec-

tion Service alleging that George Heath, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. George Heath, respondent, is an individual whose mailing address is R.R. # 1, Martin, South Dakota 57551.

2. On or about May 5, 1983, the respondent moved cattle interstate from Martin, South Dakota, to Gordon, Nebraska.

3. On or about June 2, 1983, the respondent moved cattle interstate from Martin, South Dakota, to Gordon, Nebraska.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, with respect to respondent George Heath, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of nine hundred dollars (\$900). The respondent shall send a certified check or money order for \$900.00 payable to the "Treasurer of the United States" to Jaru Ruley, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington,

D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: DR. MARVIN D. STITT. VA Docket No. 35. Decided July 23, 1985.

Veterinarian suspended for 150 Days—Consent.

Terry Medley, for complainant.

David Poarch, Norman, Oklahoma, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the regulations governing the Accreditation of Veterinarians and Suspension or Revocation of such Accreditation (9 CFR § 160.1 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that Dr. Marvin D. Stitt, hereinafter referred to as the "Respondent," violated the regulations. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The parties have agreed that this proceeding should be terminated by entry of the consent decision and order set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision and Order only, Respondent admits the jurisdictional allegations in Paragraph I of the complaint and specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this pro-

ceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the Respondent in connection with this proceeding.

FINDINGS OF FACT

1. Respondent is an individual whose mailing address is 130 Livestock Exchange Building, Oklahoma City, Oklahoma 73108.
2. Respondent is now,* and at all times material herein was a Doctor of Veterinary Medicine and an Accredited Veterinarian in the State of Oklahoma under the provisions of the regulations of Title 9, Code of Federal Regulations, Parts 160-162.

CONCLUSIONS

The Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

1. The accreditation of Respondent is hereby suspended for a period of one-hundred and fifty (150) calendar days from April 19, 1985,* to September 16, 1985.
2. This Order shall have the same force and effect as if entered after full hearing and shall be effective on the day this Order is served upon Respondent.

In re: NED PARRISH. A.Q. Docket No. 11. Decided July 24, 1985.

Cattle moved interstate—Civil penalty—Consent.

*Andrea Bateman, for complainant
Velby K. Parish, Gilmer, Texas, for respondent.*

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111, 120 and § 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Ned Parrish, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et*

* Pursuant to 9 CFR § 162.10, on April 19, 1985, Respondent's accreditation was suspended pending final determination of this matter.

seq.). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

- (a) Any further procedure;
- (b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;
- (c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Ned Parrish, respondent, is an individual whose mailing address is Rt. 2, Box 179, Gilmer, Texas 75644.

2. On or about March 15, 1983, the respondent moved two cows interstate from Grand Cane, Louisiana to Gilmer, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars (\$500) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forward to Andrea Bateman, Office of the General Counsel, Room 241 South Building, United States Department of Agriculture, Washington, D. C. 20250, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: DAVID G. DANIEL. A.Q. Docket No. 126. Decided July 29, 1985.

Cattle moved interstate—Civil penalty—Consent.

Joseph Pembroke, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120 and 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that David G. Daniel, respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.9 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDING OF FACT

1. David G. Daniel, respondent, is an individual whose mailing address is 1101 E. Mary, Garden City, Kansas 67846.

2. On or about April 20, 1983, respondent moved at least four (4) cattle from Guyman, Oklahoma to Garden City, Kansas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order will be issued.

ORDER

1. David G. Daniel, respondent, is assessed a civil penalty of six hundred dollars; however, three hundred and fifty dollars (\$350) shall be held in abeyance and will not become due and payable:

(a) For so long as the Respondent shall pay two hundred and fifty dollars (\$250) which shall be payable to the "Treasurer of the United States", by certified check or money order and which shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400.

(b) For as long as, within one year of June 10, 1985, the respondent does not violated (as that term is defined in paragraph 2 *infra*) any provision of the Act of February 2, 1903 or regulations issued thereunder.

2. The term violated, as used in paragraph 1(b) herein, means a violation found upon conviction (or upon affirmation of conviction, if appealed) or upon a final decision in a formal adjudicatory proceeding before the Secretary (or upon affirmation of the Secretary's decision, if appealed), and if it is found that there is any such violation of any term of this Order, the remaining three hundred and fifty dollars (\$350) held in abeyance shall become due and payable immediately. This provision shall not preclude the seeking of additional civil penalties because of the subsequent violation or the referral of any such alleged violation to the United States Department of Justice for possible criminal or civil proceedings.

3. This Order shall become effective on the day service of this Order is made upon the respondent.

In re: CAL STEIDLEY and JOE LEWIS. A.Q. Docket No. 114. Decided August 2, 1985.

Cattle moved interstate—Civil penalty—Consent.

Jaru Ruley, for complainant.

Tom Bruner, Tulsa, Oklahoma, for respondents.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Cal Steidley and Joe Lewis, respondents, violated the Act and regulations promulgated thereunder (9 CFR §§ 71.18 and 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondents specifically admit that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations in the complaint, admit to the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondents also waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondents in connection with this proceeding.

3. Pursuant to section 1.137 of the Rules of Practice applicable to this proceeding (7 CFR § 1.137), complainant amends the above-referenced complaint to dismiss Joe Lewis from this matter.

FINDINGS OF FACT

1. Cal Steidley, herein referred to as the respondent, is an individual whose address is P.O. Box 632, Claremore, Oklahoma 74017.

On or about November 4, 1983, the respondent moved interstate, or caused the movement interstate of, at least fifteen (15) cattle from Rogers County, Oklahoma, to Parsons, Kansas.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding with respect to respondents Cal Steidley and Joe Lewis, such order and decision will be issued.

ORDER

The respondent, Joe Lewis, is dismissed from this matter. The respondent, Cal Steidley, is assessed a civil penalty of six hundred and twenty-five dollars (\$625). The respondent shall send a certified check or money order for \$625 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D.C., 20250, within thirty (30) days from the effective date of this Order.

This Order shall become effective on the day upon which service of this order is made upon the respondents.

In re: J. PETER GRAHAM. A.Q. Docket No. 117. Decided May 17, 1985.

Cattle moved interstate without certificate, "Permit for Entry"—Civil penalty—Default.

*Mark Dopp, for complainant.
Respondent, pro se*

Decision by John A. Campbell, Administrative Law Judge.

AMENDED DEFAULT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated sections 1 and 2 of the Act (21 U.S.C. §§ 111 and 120) and sections 78.9(d)(3)(iii) of the regulations promulgated thereunder (7 CFR § 78.9(d)(3)(iii)). Copies of the complaint and the Rules of Practice Governing Proceeding Under the Act were personally served upon respondent on February 6, 1985, in Ecru, Mississippi.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the com-

plaint, and that failure to file an answer to, or plead specifically to, any allegation in the complaint would constitute an admission of such allegation pursuant to section 1.141 of the Rules of Practice (7 CFR § 1.141), and a waiver of such hearing. The letter also advised the respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver, on his part, of oral hearing. Respondent has failed to respond in any manner to allegations in the complaint and respondent has not requested an oral hearing.

Respondent's failure to deny or otherwise respond to the allegations in the complaint constitutes an admission of such allegations, pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to request a hearing constitutes a waiver of such hearing. There being no basis for a hearing, the material allegations of fact in the complaint are adopted and set forth as the Findings of Act.

FINDINGS OF FACT

1. J. Peter Graham, herein referred to as respondent, is an individual whose address is Route 1, Box 244B, Ecru, Mississippi 38841.

2. On or about March 30, 1983, the respondent violated section 78.9(d)(3)(iii) of the regulations (9 CFR § 78.9(d)(3)(iii)) in that the respondent moved two head of cattle interstate from Navarro County, Texas, a Class C area, and two head of cattle from Madison County, Texas, a Class C area, to the Pontotoc Stockyard, Pontotoc, Mississippi, without a certificate containing the prescribed information, as required.

3. On or about March 30, 1983, the respondent violated section 78.9(d)(3)(iii) of the regulations (9 CFR § 78.9(d)(3)(iii)) in that the respondent moved two head of cattle interstate from Navarro County, Texas, a Class C area, and two head of cattle from Madison County, Texas, a Class C area, to the Pontotoc Stockyard, Pontotoc, Mississippi, without a "Permit for Entry," as required.

CONCLUSION

Respondent has failed to respond in any manner to the allegations of the complaint. By reason of the Findings of Fact set forth above the respondent has violated the Act and the regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

Respondent J. Peter Graham is hereby assessed a civil penalty of one thousand dollars (\$500 per violation). The respondent shall end, payable to the "Treasurer of the United States" a certified

check or money order, to Mark D. Dopp, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250, not later than thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer within 30 days pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This amended default decision and order became final August 3, 1985.—Ed.]

In re: MICHAEL B. RUNDE. A.Q. Docket Nos. 142 and 165. Decided August 6, 1985.

Cattle moved interstate—Civil penalty—Default.

Sherrie Kopka, for complainant.

Daniel W. Olsen, Kansas City, Missouri, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111, 120, and 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Respondent admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, admits the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (9 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the Respondent in connection with this proceeding.

FINDINGS OF FACT

1. Michael B. Runde, Respondent, is an individual whose mailing address is 346 Livestock Exchange Building, Kansas City, Missouri 64182.

2. On or about April 24, 1983, the Respondent moved interstate at least two (2) cows from Fort Scott Sale Company located in Fort Scott, Kansas, within a Class B state, to Kansas City Stockyards located in Kansas City, Missouri.

3. On or about August 7, 1983, the Respondent moved interstate at least four (4) cows from Fort Scott Sale Company located in Fort Scott, Kansas, within a Class B state, to Joplin Stockyards, Inc. located in Joplin, Missouri.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Decision and Order will be issued.

ORDER

The Respondent is assessed a civil penalty of four hundred dollars (\$400.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Sherrie L. Kopka, Office of the General Counsel, Room 2422 South Bldg., United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this Order is made upon the Respondent.

In re: JIMMY HUGHES. A.Q. Docket No. 186. Decided August 1, 1985.

Cattle moved interstate—Civil penalty—Default.

Sherrie Kopka, for complainant.

B. F. Hicks, Mt. Vernon, Texas, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1908, as amended, (Act) (21 U.S.C. §§ 111 and 120), by a Complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, admits the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this Decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Jimmy Hughes, respondent, is an individual whose mailing address is Box 683, Mt. Vernon, Texas 75475.

2. On or about November 1, 1984, the respondent moved at least five (5) cows interstate from Homer Livestock Sales in Homer, Louisiana, within a Class C state, to Paris Livestock Commission Company in Paris, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of one hundred fifty dollars (\$150.00) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Sherrie L. Kopka, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Order.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: LEWIS BARBEE. A.Q. Docket No. 191. Decided August 15, 1985.

Garbage fed to swine—Civil penalty—Consent.

Sherrie Kopka, for complainant.

Respondent, pro se

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Swine Health Protection Act (7 U.S.C. § 3801 *et seq.*) (Act) by a Complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated section 4 of the Act (7 U.S.C. § 3803) and regulations promulgated thereunder (9 CFR § 166.2 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of his Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Lewis Barbee, respondent, is an individual whose mailing address is Route 2, Box 106, Morrisville, North Carolina 27560.

2. On or about May 17, 1984, the respondent fed garbage to swine.

3. On or about August 2, 1984, the respondent fed garbage to swine.

4. On or about March 26, 1985, the respondent fed garbage to swine.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of the proceeding, such Decision and Order will be issued.

ORDER

1. The respondent is assessed a civil penalty of one thousand five hundred dollars (\$1,500.00); however, one thousand three hundred dollars (\$1,300.00) shall be held in abeyance and will not become due and payable:

(a) For so long as respondent shall pay to the "Treasurer of the United States," by certified check or money order, two hundred dollars (\$200.00), which shall be forwarded to Sherrie L. Kopka, Office of the General Counsel, Room 2422 South Bldg., United States Department of Agriculture, Washington, D.C. 20250, within thirty (30) days from the effective date of this Order; and

(b) For so long as, within one (1) year of the effective date of this Order, respondent does not violate (as that term is defined in paragraph 2 *infra*) any provision of the Swine Health Protection Act or regulations promulgated thereunder.

2. The term "violate," as used in paragraph 1(b) herein, means a violation found upon conviction (or upon affirmation of conviction, if appealed) or upon a final decision in a formal adjudicatory proceeding before the Secretary (or upon affirmation of the Secretary's decision, if appealed). If it is found that there is any such violation of any term of this Order, the remaining \$1,800.00 held in abeyance shall become due and payable immediately. This provision shall not preclude the referral of any such violation to the United States Department of Justice for possible criminal or civil proceedings.

This order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: CHARLES ALLEN, JR. and ALLEN LAND AND CATTLE COMPANY.
A.Q. Docket No. 172. Decided August 20, 1985.

Brucellosis—Exposed cattle moved interstate from quarantined herd—Civil penalty—Consent.

Jaru Ruley, for complainant.

Respondents, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Charles Allen, Jr. and Allen Land and Cattle Company, respondents, violated the Act and regulations promulgated thereunder (9 CFR §§ 71.18 and 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Charles Allen, Jr., respondent, is an individual and a partner in the Allen Land and Cattle Company, and has a mailing address of P. O. Box 248, Bradley, Arkansas 71826.

2. Allen Land and Cattle Company, respondent, is a partnership having its principal place of business at P. O. Box 248, Bradley, Arkansas 71826.

3. On or about June 20, 1984, the respondents moved at least 100 brucellosis exposed cattle interstate from a quarantined herd at Bradley, Arkansas, to Livestock Producers, Bossier City, Louisiana.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding with respect to respondents Charles Allen, Jr. and Allen Land and Cattle Company, such order and decision will be issued.

ORDER

The respondent, Charles Allen, Jr., is assessed a civil penalty of four hundred dollars (\$400.00). The respondent, Allen Land and Cattle Company, is assessed a civil penalty of fifteen hundred dollars (\$1500.00). The respondents shall send certified checks or money orders, payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: PATRICIA LEE STOTLER. A.Q. Docket No. 174. Decided August 29, 1985.

Goats moved from Mexico to Texas—Civil penalty—Consent.

Mark Dopp, for complainant

Stephen D. Alfrey, Tucson, Arizona, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR §§ 92.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or basis thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Patricia Lee Stotler, respondent, is an individual whose mailing address is 301 East Pasttime, Space #19, Tucson, Arizona 85705.

2. On or about June 4, 1984, the respondent moved two female goats from Nuevo Laredo, Mexico, to the El Primero Stables, Laredo, Texas.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order will be issued.

ORDER

The respondents agree to pay four hundred dollars (\$400). The respondent shall send, payable to the "Treasurer of the United States" a certified check or money order for two hundred dollars (\$200), to Mark D. Dopp, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250, along with the signed copies of this consent decision. The remaining two hundred dollars (\$200) shall be sent within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

DISCIPLINARY DECISIONS

In re: UNITED LIVESTOCK SALES COMPANY. P&S Docket No. 6394. Decided July 8, 1985.

Market agency—Liabilities exceeded assets—Custodial Account for Shipper's Proceeds—Insufficient funds checks—Failure to remit net proceeds when due—Suspension—Consent.

Peter V Train, for complainant.

Jeffrey B. Read, Parkersburg, West Virginia, for respondent

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent has wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. United Livestock Sales Company, hereinafter referred to as the respondent, is a corporation whose business mailing address is P.O. Box 282, Parkersburg, West Virginia 26101.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the United Livestock Sales Company stockyard, a posted stockyard subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of a market agency selling livestock on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent United Livestock Sales Company, its officers, directors, agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business as a dealer or market agency while its current liabilities exceed its current assets;
2. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of its own or for purposes other than the payment of lawful marketing charges and the remittance of net proceeds to shippers, and making such other use of shippers' proceeds in its possession or control as will endanger or impair the faithful and prompt accounting therefore and payment of the portions thereof due to the person or persons entitled thereto;
3. Failing to deposit in its "Custodial Account for Shippers' Proceeds", within the time prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;
4. Failing to otherwise maintain its "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);
5. Issuing checks in payment of the net proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which the checks are drawn to pay the checks when presented.
6. Failing to remit, when due, the net proceeds resulting from the sale of livestock consigned to it for sale on a commission basis.

Respondent is suspended as a registrant under the Act for a period of twenty-eight (28) days and thereafter until it demonstrates that it is no longer insolvent and that the deficit in its custodial account for shippers' proceeds has been eliminated. When respondent demonstrates that it is no longer insolvent and that the deficit in its custodial account for shippers' proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the twenty-eight (28) day period.

The provisions of this order shall become effective immediately* after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: TONY BOTT. P&S Docket No. 6482. Decided May 29, 1985.

Dealer—Surety bond—Suspension—Civil penalty—Default.

Jory Huchberg, for complainant.

Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

**DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF
DEFAULT**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Tony Bott, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 1, Paul, Idaho 83347.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of buying livestock on a commission basis in commerce; and

* Per parties.

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

2. Respondent was notified on November 6, 1984, that it was necessary for him to secure and maintain a \$30,000.00 surety bond to secure the performance of his livestock obligations under the Act, and that if he continued his livestock operations without adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act and sections 201.29 and 201.30 of the regulations promulgated thereunder. Notwithstanding such notice, respondent has continued to engage in the business of a market agency, buying livestock in commerce on a commission basis, without maintaining adequate bond coverage or its equivalent, as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondent Tony Bott, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of One Thousand Five Hundred Dollars (\$1,500.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This decision and order became final July 10, 1985.—Ed.]

In re: ORIO MEAT COMPANY, INC. P&S Docket No. 6498. Decided July 10, 1985.

Packer—Failure to weigh properly—Failure to test scales—Civil penalty—Consent.

Thomas Heinz, for complainant.

Alvin J. Gray, Bend, Oregon, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Orio Meat Company, Inc., hereinafter referred to as respondent, is an Oregon corporation with its principal place of business located at S.W. 1607 Railroad Avenue, Redmond, Oregon 97756.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter and manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(b) A packer within the meaning and subject to the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Orio Meat Company, Inc., its officers, directors, agents, successors and assigns, directly or through any corporate or other device,

in connection with any business or operation as a packer, shall cease and desist from:

1. Weighing livestock for purpose of purchase and sale and failing to record the weight of such livestock to the nearest minimum weight value indicated on the scale;
2. Using a scale to determine livestock weights for purpose of purchase and sale which is not equipped with a printing device to record weight values on scale tickets or other documents used for this purpose;
3. Using a scale to determine livestock weights for purpose of purchase and sale which does not have stock racks securely mounted on the scale platform;
4. Weighing livestock for purpose of purchase and sale without issuing scale tickets or similar documents showing all the information required by section 201.49 of the regulations (9 CFR § 201.49); and
5. Failing to cause testing at least twice each calendar year of any scale used in the purchase and sale of livestock, and failing to submit to the Packers and Stockyards Administration copies of scale test reports at least twice each calendar year in accordance with section 201.72 of the regulations (9 CFR § 201.72).

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent is hereby assessed a civil penalty of five thousand dollars (\$5,000.00), but the payment of four thousand five hundred dollars (\$4,500.00) shall be suspended, provided for a period of five years from the effective date of this order respondent shall not violate the cease and desist provisions of this order.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: BRAD SMITH and C. J. SMITH. P&S Docket No. 6547. Decided July 10, 1985.

Market agency—Dealer—Custodial Account for Shipper's Proceeds—Insufficient funds checks—Failure to remit net proceeds when due—Suspension—Consent.

Stephen Luparello, for complainant.

Billy Fallin, Moultrie, Georgia, for respondents

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Brad Smith and C. J. Smith, hereinafter referred to as the respondents, are partners doing business as Mitchell County Stockyards. Respondents' principal place of business is located in Camilla, Georgia, and their business mailing address is P. O. Box 311, Camilla, Georgia 31730.

2. Respondents, at all times material herein, were:

(a) Engaged in the business of conducting and operating the Mitchell County Stockyards stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of a market agency buying and selling livestock in commerce on a commission basis;

(c) Engaged in the business of a dealer buying and selling livestock in commerce for their own account; and

(d) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock in commerce on a commission

basis and as a dealer to buy and sell livestock in commerce for their own account.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Brad Smith and C. J. Smith, their agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the times prescribed in section 201.42(c) of the regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;
2. Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);
3. Issuing checks in payment of the proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks when presented;
4. Failing to remit to the owners and consignors of livestock, when due, the net proceeds resulting from the sale of consigned livestock;
5. Issuing checks in payment for livestock purchased without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented; and
6. Failing to pay, when due, for livestock purchased.

Respondents are suspended as registrants under the Act for a period of twenty-one (21) days and thereafter until they demonstrate that the shortage in their Custodial Account for Shippers' Proceeds has been eliminated. When respondents demonstrate that the shortage in their Custodial Account for Shippers' Proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the twenty-one day period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondents.

Copies of this decision shall be served on the parties.

In re: JOE GREEN. P&S Docket No. 6549. Decided July 11, 1985.

Dealer—Insufficient funds checks—Failure to pay when due—Failure to pay full purchase price—Prohibited from operating subject to the Act—Consent.

Ben Bruner, for complainant.

Michael F. Scohill, Omaha, Nebraska, for respondents.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Order to Show Cause filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and is unfit to engage in activities subject to the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Joe Green, hereinafter referred to as the respondent, is an individual doing business as Green's Cattle Company. Respondent's mailing address is 620 N. 5th Street, Arlington, Nebraska 68002.
2. The respondent, at all times material herein, was engaged in the business of a dealer, buying and selling livestock in commerce for his own account.
3. The respondent has never been registered with the Secretary of Agriculture in any capacity subject to the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this order, such order will be entered.

ORDER

Respondent Joe Green, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay the full purchase price of livestock.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in his business subject to the Packers and Stockyards Act, including (a) a record of all livestock purchases and sales; (b) copies of all invoices and accounts of sale; (c) a record of all cash receipts and disbursements; and (4) records of monthly bank reconciliations.

Respondent is prohibited from operating subject to the Act for a period of nine (9) months and during such time may not register with the Secretary of Agriculture as a market agency or a dealer under the Act.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: DALE E. VAN WYK and VAN'S LIVESTOCK, INC. P&S Docket No. 6468. Decided July 18, 1985.

Market agency—Dealer—Bonding requirements—Suspension—Consent.

Stephen Luparello, for complainant.

John H. Neiman, Des Moines, Iowa, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et*

seq.). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Van's Livestock, Inc., hereinafter referred to as the corporate respondent, is a corporation organized and existing under the laws of the State of Iowa with its principal place of business in Monroe, Iowa. The business mailing address of the corporate respondent is P. O. Box 398, Monroe, IA 50170.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of a market agency, buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and as a market agency to buy and sell livestock in commerce on a commission basis.

3. Dale E. Van Wyk, hereinafter referred to as the individual respondent, is an individual whose business mailing address is R.F.D. # 1, Monroe, Iowa 50170.

4. The individual respondent is, and at all times material herein was:

(a) President of corporate respondent;

(b) Owner of 100% of the outstanding stock of the corporate respondent;

(c) Responsible for the direction, management and control of the corporate respondent;

(d) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account and the accounts of others;

(e) Engaged in the business of a market agency, buying livestock in commerce on a commission basis; and

(f) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Dale E. Van Wyk and Van's Livestock, Inc., their agents and employees, directly or indirectly through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without having or maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondents are suspended as registrants under the Act for a period of six (6) months and thereafter until such time as they comply fully with the bonding requirements under the Act and the regulations. When respondents, demonstrate that they are in full compliance with such bonding requirements a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the six month period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondents.

Copies of this decision shall be served upon the parties.

In re: GRAIN BELT FEEDERS, INC. and DANIEL WINCKLER. P&S Docket No. 6519. Decided July 18, 1985.

Dealer—Failure to purchase cattle as an investment for others as agreed—Failure to remit investment capital—Suspension—Consent.

*Ben Bruner, for complainant
Respondent, pro se.*

Decision by John A. Campbell, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Grain Belt Feeders, Inc., hereinafter referred to as the corporate respondent, is an Iowa corporation with its principal place of business located at Piersen, Iowa. Its business mailing address is Route 1, Box 69, Piersen, Iowa 51048.
2. The corporate respondent, at all times material herein, was:
 - (a) Engaged in the business of buying and selling livestock in commerce for its own account, and buying and selling livestock as the agent of the vendor or purchaser; and
 - (b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account.
3. Daniel Winckler, hereinafter referred to as the individual respondent, is an individual whose mailing address is 1104 Maple Street, Yankton, South Dakota 57078.
4. The individual respondent, at all times material herein, was:
 - (a) President of the corporate respondent;
 - (b) Owner of the corporate respondent; and
 - (c) Responsible for the direction, management and control of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Grain Belt Feeders, Inc., its officers, directors, agents and employees, and respondent Daniel Winckler, individually or as an officer, agent or employee of respondent Grain Belt Feeders, Inc., directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Deceiving investors by representing that cattle which had been purchased for the accounts of others was in fact purchased for the account of the investors to whom such representations are made;

2. Entering into agreements to purchase cattle as an investment for others and failing to purchase such cattle; and

3. Failing to remit the investment capital and any other monies due investors as provided in the investment contract.

The corporate respondent is suspended as a registrant under the Act for a period of five (5) years. The individual respondent is prohibited from operating subject to the Act for a period of five (5) years.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondents.

Copies of this decision shall be served upon the parties.

In re: DOUG WELCH d/b/a W.W. GARRY, MICHAEL BENSON, MARLOWE K. BENSON, WAGNER-HUDSON LIVESTOCK MARKETING AGENCY, INC., ROGER D. KOCH CORPORATION d/b/a SWITZER-WAGNER & Co., SWITZER-BAR 10, and ROGER D. KOCH. P&S Docket No. 6537. Decided July 19, 1985.

Market agency—Dealer—Purchasing consigned livestock at less than fair market value—Fraud or deceit—Insufficient funds check—Failure to pay when due—Consent.

Allan Kahan, for complainant

Respondent, pro se.

Decision by William J. Weber, Administrative Law Judge.

**DECISION WITH RESPECT TO ROGER D. KOCH CORPORATION AND
ROGER D. KOCH**

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

Respondents Roger D. Koch and Roger D. Koch Corporation admit the jurisdictional allegations in paragraph I of the Complaint as they pertain to them, and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Roger D. Koch Corporation is a corporation doing business as Switzer-Wagner and Co., hereinafter referred to as respondent Koch/Switzer-Wagner, and as Switzer-Bar 10, hereinafter referred to as respondent Koch/Switzer-Bar 10, and whose business mailing address is 333 Livestock Exchange Building, Sioux City, Iowa 51107.

2. Respondent Koch/Switzer-Wagner, is, and at all times material herein was:

(a) Engaged in the business of selling livestock in commerce on a commission basis and buying livestock in commerce for its own account; and

(b) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock on a commission basis and as a dealer to buy and sell livestock for its own account.

3. Respondent Koch/Switzer-Bar 10 is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for its own account and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a market agency to buy livestock on a commission basis and as a dealer to buy and sell livestock for its own account.

4. Roger D. Koch, hereinafter referred to as respondent Koch, is an individual whose business mailing address is 333 Livestock Exchange Building, Sioux City, Iowa 51107.

5. Respondent Koch is, and at all times material herein was:

(a) President of and the primary stockowner of respondents Switzer-Wagner and Switzer-Bar 10;

(b) Responsible for the management, direction and control of respondents Switzer-Wagner and Switzer-Bar 10; and

(c) Engaged in the business of buying and selling livestock in commerce for his own account and buying and selling livestock in commerce on a commission basis.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Roger D. Koch and Roger D. Koch Corporation, its agents and employees, directly or indirectly, through any corporate or other device, shall cease and desist from:

1. Engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale, on a commission basis or otherwise, of that person's livestock;
2. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency, for the purpose of purchasing consigned livestock at less than its fair or true market value;
3. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency, which would enable such market agency, employee or agent to engage in any act or practice which operates or would operate as a fraud or deceit upon the consignors of livestock to such market agency;
4. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency, to split or otherwise share in any profits derived from the resale of livestock purchased from consignments to such market agency;
5. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency buying livestock on a commission basis or dealer, or any employee or agent of such market agency or dealer, which would enable such market agency, dealer, employee or agent to engage in any act or practice which operates or would operate as a fraud or deceit upon the market agency or its customers or principals;
6. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency buying livestock on a commission basis, or any employee or agent of such market agency, to split or otherwise share in any profits derived from the sale of livestock sold to or bought on a commission basis for such market agency.
7. Issuing checks in payment for livestock purchased without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented.
8. Failing to pay, when due, the full purchase price of livestock purchased.

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondents.

Copies of this decision shall be served upon the parties.

*In re: NIXA LIVESTOCK AUCTION, INC., and JERRY M. ESTES. P&S
Docket No. 6395. Decided July 24, 1985.*

Market agency—Dealer—Engaging in business while liabilities exceed assets—Custodial Account for Shippers' Proceeds—Civil penalty—Consent.

Barbara Harris, for complainant.

Leland C Bussell, Springfield, Missouri, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. Section 181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of respondent Nixa Livestock Auction, Inc. does not meet the requirements of the Act and that respondents have wilfully violated the Act and the regulations issued thereunder (9 CFR Section 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR Section 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. (a) Respondent Nixa Livestock Auction, Inc., is a corporation with its principal place of business located at Nixa, Missouri. Its mailing address is Route 2, Box 150, Nixa, Missouri 65714.

(b) Respondent Nixa Livestock Auction, Inc., is, and at all times material herein was:

(1) Engaged in the business of conducting and operating the Nixa Livestock Auction, Inc., stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(2) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(3) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock in commerce on a commission basis, and as a dealer to buy and sell livestock in commerce for its own account.

2. (a) Respondent Jerry M. Estes is an individual whose business mailing address is Route 2, Box 150, Nixa, Missouri 65714.

(b) Respondent Jerry M. Estes is a shareholder and President of respondent Nixa Livestock Auction, Inc. At all times material herein, he was responsible for the direction, management and control of the corporate respondent.

(c) Respondent Jerry M. Estes is, and at all times material herein, was a market agency within the meaning of that term as defined in the Act, and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Nixa Livestock Auction, Inc., its officers, directors, agents, employees, successors and assigns, and respondent Jerry M. Estes, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business as a market agency or dealer while their current liabilities exceed their current assets;

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the times prescribed in section 201.42(c) of the regulations (9 CFR Section 201.42(c)), amounts equal to the proceeds due consignors for livestock purchased from consignments by respondents for market support, and amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock; and

3. Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of Section 201.42 of the regulations (9 CFR Section 201.42).

Respondent Nixa Livestock Auction, Inc. is further ordered to pay a civil penalty in the sum of Seven Thousand Dollars (\$7,000.00) as provided in the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. Section 193(b)).

Respondent Jerry M. Estes is ordered to pay a civil penalty in the amount of One Thousand Dollars (\$1,000.00) as provided in the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. Section 193(b)).

The provisions of this Order shall become effective on the date of its issuance by the Administrative Law Judge.

Copies of this Decision will be mailed to all parties to this proceeding.

In re: PATE'S STOCKYARD, INC., CIRCLE S LIVESTOCK, INC., N. ADOLPH STEWART and BARBARA STEWART. P&S Docket No. 6567. Decided July 26, 1985.

Dealer—Market agency—Custodial Account for Shippers' Proceeds—Insufficient funds checks—Engaging in business while liabilities exceed assets—Bonding requirements—Suspension—Consent.

Stephen Luparello, for complainant.

Ronald Winfrey, Fayetteville, North Carolina, for respondents Barbara Stewart, N. Adolph Stewart, and Circle S Livestock, Inc.

Decision by John A. Campbell, Administrative Law Judge.

DECISION WITH RESPECT TO CIRCLE S LIVESTOCK, INC., BARBARA STEWART, AND N. ADOLPH STEWART

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of respondent Pate's Stockyard, Inc., does not meet the requirements of the Act and that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Circle S Livestock, Inc., hereinafter referred to as respondent Circle S, is a corporation incorporated under the laws of North Carolina, with its principal place of business in Pembroke, North Carolina. Its business mailing address is Highway 711, Pembroke, North Carolina 28372.

2. Respondent Circle S is, and at all times material herein was:
a) Engaged in the business of selling livestock in commerce on a commission basis and buying and selling livestock in commerce for its own account;

b) A dealer and market agency within the meaning and subject to the provisions of the Act; and

c) Not registered with the Secretary of Agriculture to engage in business subject to the Act.

3. Pate's Stockyard, Inc, hereinafter referred to as respondent Pate's, is a corporation incorporated under the laws of North Carolina, with its principal place of business in Pembroke, North Carolina. Its business mailing address is Highway 711, Pembroke, North Carolina 28372.

4. Respondent Pate's is, and at all times material herein was:

a) Engaged in the business of selling livestock in commerce on a commission basis, and buying and selling livestock in commerce for its own account, and

b) Registered with the Secretary of Agriculture as a market agency selling on commission and as a dealer.

5. N. Adolph Stewart, hereinafter referred to as respondent Adolph Stewart, is an individual whose mailing address is 5207 Camellia Drive, Lumberton, North Carolina 28358.

6. Respondent Adolph Stewart is, and at all times material herein was:

a) President of respondent Pate's;
b) Owner of 50% of the outstanding stock of respondent Pate's;
c) Responsible, in combination with respondent Barbara Stewart, for the direction, management and control of respondent Pate's;
d) Member of the Board of Directors of respondent Circle S;
e) Owner of 50% of the outstanding stock of respondent Circle S; and
f) Responsible, in combination with respondent Barbara Stewart, for the direction, management and control of respondent Circle S.

7. Barbara Stewart, hereinafter referred to as respondent Barbara Stewart, is an individual whose mailing address is 5207 Camellia Drive, Lumberton, North Carolina 28358.

8. Respondent Barbara Stewart is, and at all times material herein was:

a) Vice-President of respondent Pate's;

b) Owner of 50% of the outstanding stock of respondent Pate's;

- c) Responsible, in combination with respondent Adolph Stewart, for the direction, management and control of respondent Pate's;
- d) Member of the Board of Directors of respondent Circle S;
- e) Owner of 50% of the outstanding stock of respondent Circle S; and
- f) Responsible in combination with respondent Adolph Stewart, for the direction, management and control of respondent Circle S.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Adolph Stewart and Barbara Stewart, their agents and employees, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to maintain their "Custodial Account for Shippers' Proceeds" in strict conformity with the provisions of section 210.42 of the regulations (9 CFR § 201.42);
2. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own or for purposes other than the payment of net proceeds to the owners, consignors or shippers of livestock and the payment of amounts due respondents for lawful marketing charges;
3. Issuing checks to consignors in payment for livestock sold on a commission basis without having and maintaining sufficient funds on deposit and available in the accounts upon which such checks were drawn to pay such checks when presented; and
4. Engaging in business as a market agency or a dealer subject to the Act while their current liabilities exceed their current assets.

Respondents Circle S Livestock, Inc., Adolph Stewart and Barbara Stewart, their agents and employees, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act shall cease and desist from engaging in business in any capacity which bonding is required under the Act and the regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondents Adolph Stewart, Barbara Stewart and Circle S Livestock, Inc., are prohibited from engaging in business subject to the

Act for a period of 35 days, and thereafter until such time as they comply fully with the bonding requirements under the Act and the regulations. When the respondents demonstrate that they are in full compliance with the bonding requirements, a supplemental order will be issued to this proceeding in accordance with the terms of this decision, terminating the suspension after the expiration of the 35 day period.

The provisions of this order shall become effective upon notice to the respondents of signature of the Administrative Law Judge.

Copies of this decision shall be served upon the parties.

*In re: D & R LIVESTOCK, INC., and DONALD D. RICHARDS. P&S
Docket No. 6502. Decided July 31, 1985.*

Dealer—Bonding requirements—Civil penalty—Consent.

Jory Hochberg, for complainant.

Respondent, pro se.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. D&R Livestock, Inc., hereinafter referred to as the corporate respondent, is a corporation with its principal place of business located in Sparta, Tennessee. Its business mailing address is Route 9, Box 345, Sparta, Tennessee 38583.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for its own account;

(b) A dealer within the meaning and subject to the provisions of the Act; and

(c) The successor to the previous individual livestock operations of respondent Donald D. Richards.

3. Donald D. Richards, formerly conducting individual livestock operations as D&R Livestock, hereinafter referred to as the individual respondent, is an individual whose business mailing address is Route 9, Box 345, Sparta, Tennessee 38583.

4. The individual respondent is, and at all times material herein was:

(a) President of the corporate respondent;

(b) Owner of a substantial percentage of the outstanding stock of the corporate respondent;

(c) Responsible for the direction, management and control of the corporate respondent;

(d) Engaged in the business of buying and selling livestock in commerce either as an individual for his own account or through the corporate respondent; and

(e) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent D&R Livestock, Inc., its agents and employees, directly or indirectly through any corporate or other device, and Donald D. Richards, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondents are presently in full compliance with the bonding requirements of the Act and regulations. Therefore, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents are jointly and severally assessed a civil penalty in the amount of \$2,000.00.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondents.

Copies of this decision shall be served upon the parties.

In re: LIMESTONE COUNTY STOCKYARD, INC., RALPH SHAW and ROGER RIDGEWAY. P&S Docket No. 6535. Decided July 31, 1985.

Market agency—Engaging in business while liabilities exceed assets—Custodial Account for Shippers' Proceeds—Suspension—Consent.

Ben Bruner, for complainant.

Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the corporate respondent's financial condition did not meet the requirements of the Act and that the respondents wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Limestone County Stockyard, Inc., hereinafter referred to as the corporate respondent, is a corporation organized and existing under the laws of the State of Alabama, with its principal place of business in Athens, Alabama. The corporate respondent's mailing address is P. O. Box 498, Athens, Alabama 35611.

2. Corporate respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Limestone County Stockyard, Inc., a posted stockyard under the Act;

(b) Engaged in the business of selling livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

3. Ralph Shaw, hereinafter referred to as respondent Shaw, is an individual whose business mailing address is P. O. Box 493, Athens, Alabama 35611.

4. Respondent Shaw is, and at all times material herein was:

(a) President of the corporate respondent;

(b) Owner of 50% of the outstanding stock of the corporate respondent;

(c) Responsible for the direction, management and control of the corporate respondent;

(d) Engaged in the business of buying and selling livestock in commerce for his own account; and

(e) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

5. Roger Ridgeway, hereinafter referred to as respondent Ridgeway, is an individual whose business mailing address is P. O. Box 493, Athens, Alabama 35611.

6. Respondent Ridgeway is, and at all times material herein was:

(a) Vice-President of the corporate respondent;

(b) Owner of 50% of the outstanding stock of the corporate respondent; and

(c) Responsible for the direction, management and control of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Limestone County Stockyard, Inc., and Roger Ridgeway, their agents and employees, directly or through any corporate or other device, in connection with their operations subject to the Act, shall cease and desist from:

1. Engaging in business subject to the Act while their current liabilities exceed their current assets;

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the time prescribed by section 201.42 of the regu-

lations (9 CFR § 201.42), an amount equal to the proceeds receivable from the sale of consigned livestock; and

3. Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the requirements of section 201.42 of the regulations.

Respondent Limestone County Stockyard, Inc., is suspended as a registrant under the Act for 14 days and thereafter until such time as it demonstrates that the shortage in the Limestone County Stockyard, Inc., custodial account is corrected. When corporate respondent demonstrates that the shortage in the Limestone County Stockyard, Inc., custodial account has been corrected, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 14 day period.

The provisions of this order shall become effective on July 31, 1985.

Copies of this decision shall be served upon the parties.

In re: VIRGIL P. MILLER and E. K. CORRIGAN Co. P&S Docket No. 6557. Decided August 7, 1985.

Dealer—Insufficient funds check—Failure to pay when due—Suspension—Consent.

Peter Train, for complainant.

Timothy I. Markel, Council Bluff, Iowa, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION WITH RESPECT TO VIRGIL P. MILLER

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Virgil P. Miller admits the jurisdictional allegations in paragraph I of the complaint as they pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Virgil P. Miller, hereinafter referred to as respondent Miller, is an individual whose mailing address is Box 372, Treynor, Iowa 51575.

2. Respondent Miller at all times material herein was:

- (a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and
- (b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

Respondent Virgil P. Miller having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Miller, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay the checks when presented;

2. Failing to pay, when due, for livestock; and

3. Failing to pay for livestock.

Respondent Virgil P. Miller is suspended as a registrant under the Act for a period of six months.

The provisions of this order shall become effective on the sixth day after service of this decision on respondent.

Copies of this decision shall be served on the parties.

In re: DALE EMBERTON and ROCK PORT SALES, INC. P&S Docket No. 6560. Decided August 7, 1985.

Market agency—Custodial Account for Shippers' Proceeds—Insufficient funds checks—Failure to remit net proceeds—Suspension—Consent.

Stephen Lupaello, for complainant.

Respondent, *pro se*

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Rock Port Sales Company, Inc., hereinafter referred to as respondent Rock Port, is a corporation existing under the laws of the state of Missouri with its principal place of business in Rock Port, Missouri. Respondent Rock Port's mailing address is East U.S. 136 Highway, Rock Port, Missouri 64482.

2. Respondent Rock Port at all times material herein was:

a) Engaged in the business of conducting and operating the Rock Port Sales Company, Inc. stockyard, a stockyard posted under the Act, hereinafter referred to as the stockyard;

b) Engaged in the business of selling livestock on a commission basis at the stockyard; and

c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce.

3. Dale Emberton, hereinafter referred to as respondent Emberton, is an individual whose business mailing address is East U.S. 136 Highway, Rock Port, Missouri 64482.

4. Respondent Emberton at all times material herein was:

- a) President of respondent Rock Port;
- b) Owner of 100% of the outstanding stock of respondent Rock Port; and
- c) Responsible for the direction, management and control of respondent Rock Port.

5. Respondent Emberton at all times material herein was a market agency within the meaning and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Rock Port Sales, Inc., its officers, directors, agents, and employees, directly or through any corporate or other device, and respondent Dale Emberton, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Failing to maintain their Custodial Account for Shippers' proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);
2. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own or for any purpose other than the payment of lawful marketing charges and the remittance of net proceeds to the owners, shippers or consignors of livestock;
3. Issuing checks in payment of the proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they were drawn to pay such checks when presented; and
4. Failing to remit to the owners and consignors of livestock, when due, the net proceeds resulting from the sale of consigned livestock.

Respondent Rock Port Sales, Inc., is suspended as a registrant under the Act for a period of one hundred twenty (120) days.

Respondent Dale Emberton is suspended as a registrant under the Act for a period of one hundred twenty (120) days.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondents.

Copies of this decision shall be served upon the parties.

In re: GORDON BRAY. P&S Docket No. 6486. Decided August 15, 1985.

Dealer—Bonding requirements—Civil penalty—Consent.

Barbara Harris, for complainant.

Kurt H. King, Springfield, Missouri, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Gordon Bray, hereinafter referred to as the respondent, is an individual whose business mailing address is Protem, Missouri 65733.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Gordon Bray, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Insofar as respondent is now in full compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Eighteen Hundred Dollars (\$1,800.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

'n re: PATE'S STOCKYARD, INC., CIRCLE S LIVESTOCK, INC., N. ADOLPH STEWART and BARBARA STEWART. P&S Docket No. 6567. Decided August 16, 1985.

Dealer—Market agency—Custodial Account for Shippers' Proceeds—Insufficient funds checks—Engaging in business while liabilities exceed assets—Suspension—Consent.

*Stephen Luparello, for complainant
Respondent, pro se.*

Decision by John A. Campbell, Administrative Law Judge.

DECISION WITH RESPECT TO PATE'S STOCKYARD, INC.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of respondent Pate's Stockyard, Inc., does not meet the requirements of the Act and that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remain-

ing allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Circle S Livestock, Inc., hereinafter referred to as respondent Circle S, is a corporation incorporated under the laws of North Carolina, with its principal place of business in Pembroke, North Carolina. Its business mailing address is Highway 711, Pembroke, North Carolina 28372.

2. Respondent Circle S is, and at all times material herein was:

a) Engaged in the business of selling livestock in commerce on a commission basis and buying and selling livestock in commerce for its own account;

b) A dealer and market agency within the meaning and subject to the provisions of the Act; and

c) Not registered with the Secretary of Agriculture to engage in business subject to the Act.

3. Pate's Stockyard, Inc., hereinafter referred to as respondent Pate's, is a corporation incorporated under the laws of North Carolina, with its principal place of business in Pembroke, North Carolina. Its business mailing address is Highway 711, Pembroke, North Carolina 28372.

4. Respondent Pate's is, and at all times material herein was:

a) Engaged in the business of selling livestock in commerce on a commission basis, and buying and selling livestock in commerce for its own account, and

b) Registered with the Secretary of Agriculture as a market agency selling on commission and as a dealer.

5. N. Adolph Stewart, hereinafter referred to as respondent Adolph Stewart, is an individual whose mailing address is 5207 Camellia Drive, Lumberton, North Carolina 28358.

6. Respondent Adolph Stewart is, and at all times material herein was:

a) President of respondent Pate's;

b) Owner of 50% of the outstanding stock of respondent Pate's;

c) Responsible, in combination with respondent Barbara Stewart, for the direction, management and control of respondent Pate's;

d) Member of the Board of Directors of respondent Circle S;

e) Owner of 50% of the outstanding stock of respondent Circle S; and

f) Responsible, in combination with respondent Barbara Stewart, for the direction, management and control of respondent Circle S.

7. Barbara Stewart, hereinafter referred to as respondent Barbara Stewart, is an individual whose mailing address is 5207 Camellia Drive, Lumberton, North Carolina 28358.

8. Respondent Barbara Stewart is, and at all times material herein was:

a) Vice-President of respondent Pate's;

b) Owner of 50% of the outstanding stock of respondent Pate's;

c) Responsible, in combination with respondent Adolph Stewart, for the direction, management and control of respondent Pate's;

d) Member of the Board of Directors of respondent Circle S;

e) Owner of 50% of the outstanding stock of respondent Circle S; and

f) Responsible in combination with respondent Adolph Stewart, for the direction, management and control of respondent Circle S.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Pate's Stockyard, Inc., its agents and employees, directly or through any corporate or other device, in connection with its operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to maintain its "Custodial Account for Shippers' Proceeds" in strict conformity with the provisions of section 210.42 of the regulations (9 CFR § 201.42);

2. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of its own or for purposes other than the payment of net proceeds to the owners, consignors or shippers of livestock and the payment of amounts due respondents for lawful marketing charges;

3. Issuing checks to consignors in payment for livestock sold on a commission basis without having and maintaining sufficient funds on deposit and available in the accounts upon which such checks were drawn to pay such checks when presented; and

4. Engaging in business as a market agency or a dealer subject to the Act while its current liabilities exceed their current assets.

Respondent Pate's Stockyard, Inc., is suspended as a registrant under the Act for a period of thirty five (35) days and thereafter until it demonstrates that its current assets exceed its current liabilities. When respondent Pate's Stockyard, Inc. demonstrates that its current assets exceed its current liabilities, a supplemental order will be issued to this proceeding in accordance with the terms of this decision, terminating the suspension after the expiration of the 35 day period.

The provisions of this order shall become effective upon notice to the respondents of signature of the Administrative Law Judge.

Copies of this decision shall be served upon the parties.

In re: LANDMARK BEEF PROCESSORS, INC., JOHN M. BURBANK, ALAN SILVERBERG, RONALD HILLMAN, and CHAIM TREIBATCH. P&S Docket No. 6174. Decided August 19, 1985.

Packer—Failure to pay when due—Financial statements and inventory reports—Accounts of sale or purchase—Civil penalty—Consent.

Allan Kahan and Jory Hochberg, for complainant.

George E. Atkinson, Jr., Paramount, California, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION WITH RESPECT TO JOHN M. BURBANK

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, and a subsequent Amended Complaint and Notice of Hearing alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent John M. Burbank admits the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing as they pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. John M. Burbank, hereinafter referred to as respondent Burbank, is an individual whose mailing address is 35 Hill Top Circle Drive, Rancho Palos Verde, California 90274.

2. Respondent Burbank is, and at all times material herein was:

(a) President of Landmark Beef Processors and a principal owner of the stock of Landmark Management Company, a holding company which owns 100% of the stock of the corporate respondent;

(b) With Alan Silverberg, Ronald Hillman and Chaim Trebatch, responsible for the management, direction and control of the policies and practices of respondent Landmark Beef Processors; and

(c) A packer within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

Respondent John M. Burbank having admitted the jurisdictional facts and the parties having agreed to the entry of this decision such decision will be entered.

ORDER

Respondent John M. Burbank, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, for meat and meat food products purchased;

2. Preparing and using any false, misleading, incorrect or incomplete financial statements or inventory reports for the purpose of inducing suppliers and vendors of meat and meat food products to sell or otherwise transfer such products to respondents.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in his business subject to the Packers and Stockyards Act and the regulations, including, but not limited to: (1) invoices and other accountings which disclose all purchases and sales of meat or meat food products; (2) records of all receipts and disbursements; (3) a general ledger of accounts disclosing respondent's assets, liabilities, income, expenses and net worth; and (4) an accurate and current inventory record.

Respondent shall keep and maintain, and shall not destroy or otherwise dispose of, any purchase invoices, sales invoices, inventory records, or similar accounts and records documenting the purchase and sale of meat or meat food products for a minimum period of two years. In addition, respondent shall strictly comply

with the provisions of section 203.4 of the statements of general policy (9 CFR § 203.4).

Respondent John M. Burbank, is hereby assessed a civil penalty in the amount of Ten Thousand Dollars (\$10,000.00).

The provisions of this order shall become effective on the first day after service of this decision on respondent John M. Burbank.

Copies hereof shall be served upon the parties.

In re: LANDMARK BEEF PROCESSORS, INC., JOHN M. BURBANK, ALAN SILVERBERG, RONALD HILLMAN, and CHAIM TREIBATCH. P&S Docket No. 6174. Decided August 19, 1985.

Packer—Failure to pay when due—Financial statements and inventory reports—Accounts of sale or purchase—Civil penalty—Consent.

Allan Kahan and Jory Hochberg, for complainant.

George E. Atkinson, Jr., Paramount, California, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION WITH RESPECT TO ALAN SILVERBERG

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, and a subsequent Amended Complaint and Notice of Hearing alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding. (7 CFR § 1.138)

Respondent Alan Silverberg admits the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing as they pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Alan Silverberg, hereinafter referred to as respondent Silverberg, is an individual whose mailing address is Wyncote House, Suite A, Wyncote, Pennsylvania 19095.

2. Respondent Silverberg is, and at all times material herein was:

- (a) Vice-President of Landmark Beef Processors and a principle owner of the stock of Landmark Management Company, a holding company which owns 100% of the stock of the corporate respondent;
- (b) With John M. Burbank, Ronald Hillman and Chaim Treibach, responsible for the management, direction and control of the policies and practices of respondent Landmark Beef Processors; and
- (c) A packer within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

Respondent Alan Silverberg having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Alan Silverberg, his agents and employees, individually or through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, for meat and meat food products purchased;
2. Preparing and using any false, misleading, incorrect or incomplete financial statements or inventory reports for the purpose of inducing suppliers and vendors of meat and meat food products to sell or otherwise transfer such products to respondents.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in his business subject to the Packers and Stockyards Act and the regulations, including, but not limited to: (1) invoices and other accountings which disclose all purchases and sales of meat or meat food products; (2) records of all receipts and disbursements; (3) a general ledger of accounts disclosing respondent's assets, liabilities, income, expenses and net worth; and (4) an accurate and current inventory record.

Respondent shall keep and maintain, and shall not destroy or otherwise dispose of, any purchase invoices, sales invoices, inventory records, or similar accounts and records documenting the purchase and sale of meat or meat food products for a minimum period of two years. In addition, respondent shall strictly comply with the provisions of section 203.4 of the statements of general policy (9 CFR § 203.4).

Respondent Alan Silverberg is hereby assessed a civil penalty in the amount of Ten Thousand Dollars (\$10,000.00).

The provisions of this order shall become effective on the first day after service of this decision on respondent Alan Silverberg. Copies hereof shall be served upon the parties.

In re: SOUTHEAST GEORGIA STOCKYARD, INC., and LOUIS N. WOODRUM. P&S Docket No. 6396. Decided August 21, 1985.

Market agency—Custodial Account for Shippers' Proceeds—Insufficient funds checks—Failure to remit net proceeds when due—Failure to pay when due and to pay full purchase price—Suspension—Consent.

Barbara Harris, for complainant.

Grayson P. Lane, Brunswick, Georgia, for respondent

Decision by John A. Campbell, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I and II of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Southeast Georgia Stockyard, Inc., hereinafter referred to as the corporate respondent, is a Georgia corporation with its principal place of business at Statesboro, Georgia, and its business mailing address is P. O. Box 681, Stockyard Road, Statesboro, Georgia 30458.

2. Corporate respondent, at all times material herein, was:

(a) Engaged in the business of conducting and operating the Southeast Georgia Stockyard, Inc. stockyard, a stockyard posted under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard;

(c) Engaged in the business of buying and selling livestock in commerce for its own account; and

(d) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce, and as a dealer to buy and sell livestock in commerce.

3. Louis N. Woodrum, hereinafter referred to as the individual respondent, is an individual whose business mailing address is P.O. Box 681, Statesboro, Georgia 30458.

4. The individual respondent, at all times material herein, was:

(a) President of the corporate respondent;

(b) Owner of 50% of the outstanding stock of the corporate respondent;

(c) Responsible for the direction, management and control of the corporate respondent; and

(d) A market agency and dealer within the meaning of those terms as defined in the Act and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

The corporate respondent, its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, and the individual respondent, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in their "Custodial Account for Shippers' Proceeds," within the time prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to otherwise maintain their "Custodial Account for Shippers' Proceeds" in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

3. Issuing checks to consignors in payment of the net proceeds resulting from the sale of their livestock on a commission basis without having sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented;

4. Failing to remit, when due, to consignors the net proceeds resulting from the sale of their livestock;
5. Failing to remit to consignors the net proceeds resulting from the sale of their livestock;
6. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented;
7. Failing to pay, when due, the full purchase price of livestock; and
8. Failing to pay the full purchase price of livestock.

The corporate respondent is suspended as a registrant under the Act for six (6) months and thereafter until it demonstrates that the deficit in its "Custodial Account for Shippers' Proceeds" has been eliminated. When the corporate respondent demonstrates that such deficit has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the six month period.

The individual respondent, Louis N. Woodrum, is prohibited for six months from engaging in business or operating subject to the Act as a market agency, buying or selling livestock in commerce on a commission basis, or furnishing stockyard services, or as a dealer, buying or selling livestock in commerce either for his own account or as the employee or agent of the vendor or purchaser.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondents.

Copies of this decision shall be served upon the parties.

In re: Coy Von WOMACK, P&S Docket No. 6263. Decided July 11, 1985.

Market agency—Dealer—Surety bond—Liabilities exceeded assets—Custodial Account for Shippers' Proceeds—Insufficient funds checks—Accounts and records—Suspension—Default.

Barbara Harris, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

**DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF
DEFAULT**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et*

seq.), herein referred to as the Act, instituted by an amended complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the amended complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the amended complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the amended complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Coy Von Womack, doing business as Cleburne County Livestock Auction, hereinafter referred to as the respondent, is an individual whose business mailing address is P. O. Box 412, Heber Springs, Arkansas 72543.

(b) Respondent, at all times material herein, was:

(1) Engaged in the business of conducting and operating the Cleburne County Livestock Auction stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(2) Engaged in the business of buying and selling livestock in commerce for his own account and buying and selling livestock in commerce on a commission basis at the stockyard; and

(3) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock in commerce on a commission basis, and as a dealer to buy and sell livestock in commerce for his own account.

2. Respondent was notified on September 26, 1983, that the \$45,000.00 surety bond maintained to secure the performance of his livestock obligations under the Act was inadequate and that if he continued his livestock operations without adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act and sections 201.29 and 201.30 of the regulations promulgated thereunder. Notwithstanding such notice, respondent continued to engage in the business of a market agency selling livestock in com-

merce on a commission basis, without having and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

3. (a) As of June 29, 1984, the respondent's current liabilities exceeded his current assets. As of that date, the respondent had current liabilities totalling \$535,904.84 and current assets totalling \$101,832.73, resulting in an excess of current liabilities over current assets of \$434,072.11.

(b) Respondent's current liabilities presently exceed his current assets.

4. Respondent, during the period May 26, 1984, through June 29, 1984, failed to properly maintain and use his "Custodial Accounts for Shippers' Proceeds," hereinafter referred to as the custodial accounts, thereby endangering the faithful and prompt accounting therefor, and payment of the portions thereof due the owners and consignors of livestock in that:

(a) As of May 26, 1984, respondent had outstanding checks drawn on his custodial account No. 1-833-5 in the amount of \$57,819.81, and had, to offset such outstanding checks, cash in his custodial account in the amount of \$312.18, deposits in transit in the amount of \$26,365.42, and proceeds receivable in the amount of \$7,747.90, resulting in a deficiency of \$23,394.31 in funds available to pay shippers' proceeds;

(b) As of June 4, 1984, respondent had a deficiency in his custodial account No. 1-833-5 in the amount of \$41,254.52. As of that date, respondent had outstanding custodial account checks in the amount of \$84,894.48, and had, to offset the outstanding checks, a balance in the custodial account in the amount of \$48.03, no deposits in transit and proceeds receivable in the amount of \$48,591.93.

(c) As of June 12, 1984, respondent had deficiencies in his custodial account Nos. 1-833-5 and 52-254-6 totalling \$48,533.29. As of that date, respondent had total outstanding custodial account checks in the amount of \$63,485.66, and had, to offset the outstanding checks, a total balance in his custodial accounts in the amount of \$10,524.18, no deposits in transit and total proceeds receivable in the amount of \$4,428.19.

(d) As of June 29, 1984, respondent had deficiencies in his custodial accounts totalling \$39,980.98. As of that date, respondent had total outstanding custodial account checks in the amount of \$39,797.49, and overdrafts totalling \$560.49, and had, to offset the outstanding checks and overdrafts, deposits in transit in the amount of \$377.00, and no proceeds receivable.

(e) The custodial account deficiencies were caused, in part, by respondent's use of custodial account funds for purposes of his own

and purposes other than the payment of the net proceeds to the owners or consignors of livestock, or for the payment of sums due the respondent as compensation for services rendered or for other lawful marketing charges, in that respondent failed to deposit to his custodial account the total amounts received by respondent from purchasers of livestock from consignments.

5. (a) Respondent, on or about the dates and in the transactions set forth in paragraph V of the amended complaint and in various other transactions, issued checks to consignors in purported payment of the net proceeds resulting from the sale of their livestock on a commission basis, which checks were returned unpaid because respondent did not have sufficient funds on deposit and available in the account on which such checks were drawn to pay such checks when presented.

(b) Respondent, on or about the dates and in the transactions specified in paragraph V(a) of the amended complaint, sold livestock consigned to him for sale on a commission basis and failed to remit to the consignors of such livestock, when due, the net proceeds resulting from the sale of their livestock.

(c) As of October 5, 1984, there remained unpaid by the respondent a total of at least \$42,530.00 for such livestock sold on a commission basis.

6. (a) Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth in paragraph VI of the amended complaint, purchased livestock and in purported payment therefor issued checks which were returned unpaid by the bank upon which they were drawn because respondent did not have sufficient funds on deposit and available to pay such checks when presented.

(b) Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions specified in paragraph VI(a) of the amended complaint, and in the transactions specified in paragraph VI(b) of the amended complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of October 5, 1984, there remained unpaid a total of at least \$33,162.28 for such livestock purchases specified in paragraphs VI(a) and (b) of the amended complaint.

7. Respondent, in connection with his operations as a market agency and dealer, failed to keep and maintain accounts, records and memoranda which fully and correctly disclose his transactions subject to the Act and the regulations, in that respondent failed to keep and maintain: (a) monthly reconciliations of his bank accounts; (b) monthly listings of outstanding checks for his bank ac-

counts; (c) a general ledger; (d) a cash disbursements journal or record of checks issued; (e) a cash receipts journal or record of all cash received; (f) a schedule of notes payable; (g) an accounts payable ledger; and (h) an accounts receivable ledger.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

By reason of the facts found in Finding of Fact 3 herein, respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts found in Finding of Fact 4 herein, the respondent has wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.42 of the regulations (9 CFR § 201.42).

By reason of the facts found in Finding of Fact 5 herein, respondent has wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.43(a) of the regulations (9 CFR § 201.43(a)).

By reason of the facts found in Finding of Fact 6 herein, respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

By reason of the facts found in Finding of Fact 7 herein, respondent has violated section 401 of the Act (7 U.S.C. 221).

ORDER

Respondent Coy Von Womack, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Act without having and maintaining an adequate bond or its equivalent, as required by the Act and the regulations;

2. Failing to deposit in his Custodial Account for Shippers' Proceeds, within the time prescribed in section 201.42 of the regulations (9 CFR § 201.42), amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

3. Using funds received as proceeds from the sale of consigned livestock for purpose of his own or for any purpose other than the payment of the net proceeds to the owners or consignors of such livestock, or for the payment of sums due the respondent as com-

pensation for services rendered or for other lawful marketing charges;

4. Making such use or disposition of funds of his possession or control as will endanger or impair the faithful and prompt accounting therefor and the payment of the portions thereof which may be due the owners or consignors of livestock;

5. Failing to otherwise maintain his Custodial Account of Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

6. Issuing checks to consignors in payment of the net proceeds resulting from the sale of their livestock on a commission basis without having sufficient funds on deposit and available in the bank account upon which checks are drawn to pay such checks when presented;

7. Failing to remit, when due, to consignors the net proceeds resulting from the sale of their livestock;

8. Failing to remit to consignors the net proceeds resulting from the sale of their livestock;

9. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented;

10. Failing to pay, when due, the full purchase price of livestock; and

11. Failing to pay the full purchase price of livestock.

Respondent, in connection with his operations as a market agency and dealer, shall keep and maintain accounts, records and memoranda which fully and correctly disclose his transactions subject to the Packers and Stockyards Act and the regulations, including but not limited to: (1) monthly reconciliations of his bank accounts; (2) monthly listings of outstanding checks for his bank accounts; (3) a general ledger, (4) a cash disbursements journal or record of checks issued; (5) a cash receipts journal or record of all cash received; (6) a schedule of notes payable; (7) an accounts payable ledger; and (8) an accounts receivable ledger.

Respondent is suspended as a registrant for 120 days and thereafter until such time as he complies fully with the bonding requirements of the Act and the regulations and until he demonstrates that he is no longer insolvent and that the deficit in his custodial accounts have been eliminated. When respondent demonstrates the above, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 120-day period.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This decision and order became final August 23, 1985—Ed.]

In re: BILL BOWEN. P&S Docket No. 6531. Decided August 23, 1985.

Dealer—Misrepresentation of prices and charges—Accounts and records—Suspension—Consent.

Ben Bruner, for complainant.

Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Bill Bowen, hereinafter referred to as the respondent, is an individual doing business as Bill Bowen Cattle Company whose business mailing address is 3226 Canterbury Drive, Salina, Kansas 67401.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account;

(b) Engaged in the business of buying livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Bill Bowen, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Misrepresenting to his principals or to other purchasers of livestock from respondent (a) the original purchase prices of livestock, or (b) the true nature of the charges made for his buying services;
2. Preparing and issuing, or causing to be prepared and issued, in connection with the purchase or sale of livestock, accounts of purchase, invoices, billings, or any other document showing false, inaccurate, or misleading price entries for such livestock;
3. Collecting payment from the purchasers of livestock on the basis of false, inaccurate, or misleading price entries on accounts of purchase, invoices, or billings; and
4. Inserting or failing to insert in accounts of purchase, invoices, billings, or any other document prepared in connection with the purchase or sale of livestock, any statement or information where such insertion or omission results, in whole or in part, in a false, inaccurate or misleading record of such livestock purchase or sale transaction.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in his business subject to the Packers and Stockyards Act, including accountings, invoices, and billings which show the true and correct prices and weights of livestock.

Respondent is suspended as a registrant under the Packers and Stockyards Act for a period of One Hundred and Eighty (180) days.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: FRANK McGUINNESS. P&S Docket No. 6539. Decided August 23, 1985.

Market agency—Dealer—Bonding requirement—Suspension—Civil penalty—Consent.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Frank McGuinness, doing business as Arrow Cattle Co., hereinafter referred to as the respondent, is an individual whose business mailing address is RFD #1, Box 70, Butte, Montana 59701.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of market agency buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Frank McGuinness, his agents and employees, directly or through any corporate or other device, shall cease and desist

from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Seven Hundred Fifty Dollars (\$750.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: LIMESTONE COUNTY STOCKYARD, INC., RALPH SHAW, and ROGER RIDGEWAY. P&S Docket No. 6535. Decided August 27, 1985.

Market agency—Custodial Account for Shippers' Proceeds—Liabilities exceeded assets—Consent.

Ben Bruner, for complainant
Respondent, pro se.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION WITH RESPECT TO RALPH SHAW

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the corporate respondent's financial condition did not meet the requirements of the Act and that the respondents wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding. (7 CFR § 1.138).

Respondent Ralph Shaw admits the jurisdictional allegations in paragraph I of the complaint as they pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purposes of

settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Limestone County Stockyard, Inc., hereinafter referred to as the corporate respondent, is a corporation organized and existing under the laws of the State of Alabama, with its principal place of business in Athens, Alabama. The corporate respondent's mailing address is P. O. Box 493, Athens, Alabama 35611.

2. Corporate respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Limestone County Stockyard, Inc., a posted stockyard under the Act;

(b) Engaged in the business of selling livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

3. Ralph Shaw, hereinafter referred to as respondent Shaw, is an individual whose business mailing address is P. O. Box 493, Athens, Alabama 35611.

4. Respondent Shaw at all times material herein was:

(a) President of the corporate respondent;

(b) Owner of 50% of the outstanding stock of the corporate respondent;

(c) Responsible for the direction, management and control of the corporate respondent;

(d) Engaged in the business of buying and selling livestock in commerce for his own account; and

(e) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

5. Roger Ridgeway, hereinafter referred to as respondent Ridgeway, is an individual whose business mailing address is P. O. Box 493, Athens, Alabama 35611.

6. Respondent Ridgeway at all times material herein was:

(a) Vice-President of the corporate respondent;

(b) Owner of 50% of the outstanding stock of the corporate respondent; and

(c) Responsible for the direction, management and control of the corporate respondent.

CONCLUSIONS

Respondent Ralph Shaw having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Ralph Shaw, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Act, shall cease and desist from:

1. Engaging in business subject to the Act while his current liabilities exceed his current assets;
2. Failing to deposit in his Custodial Account for Shippers' Proceeds, within the time prescribed by section 201.42 of the regulations (9 CFR § 201.42), an amount equal to the proceeds receivable from the sale of consigned livestock; and
3. Failing to otherwise maintain his Custodial Account for Shippers' Proceeds in strict conformity with the requirements of section 201.42 of the regulations.

The provisions of this order shall become effective on the sixth day after service of this decision on respondent Ralph Shaw.

Copies of this decision shall be served upon the parties.

In re: HARRY D. JONES. P&S Docket No. 6551. Decided August 29, 1985.

Dealer—Bonding requirement—Failure to pay when due—Suspension—Consent.

Peter V Train, for complainant

Respondent, pro se

Decision by William J. Weber, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary

has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Harry D. Jones, hereinafter referred to as the respondent, is an individual whose business mailing address is 365 Eagle Drive, Panama City Beach, Florida.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Jones, his agents, employees and assigns, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations;

2. Failing to pay, when due, for livestock purchases; and

3. Failing to pay for livestock purchases.

Respondent is suspended as a registrant under the Act for a period of eight (8) months and thereafter until he complies with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the eight (8) month period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: CLARK COUNTY COMMISSION, INC. P&S Docket No. 6555. Decided August 30, 1985.

Market agency—Bonding requirements—Civil penalty—Consent.

Eric Paul, for complainant

William G. Wright, Arkadelphia, Arkansas, for respondent

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Clark County Commission, Inc., hereinafter referred to as the respondent, is a corporation whose business mailing address is Highway 67 North, Arkadelphia, Arkansas 71923

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Clark County Commission, Inc., stockyard, a posted stockyard under the Act and subject to the provisions of the Act;

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis; and

(c) Not registered with the Secretary of Agriculture.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Clark County Commission, Inc., its officers, directors, agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of One Thousand Five Hundred Dollars (\$1,500.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: DONALD R. HOGG, P&S Docket No. 6500. Order issued July 12, 1985.

Order issued by William J. Weber, Administrative Law Judge.

SUPPLEMENTAL ORDER

On April 15, 1985, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations.

Respondent has filed, effective June 13, 1985, a trust fund agreement that satisfies his bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued April 15, 1985, is terminated. The order shall remain in full force and effect in all other respects.

In re: CORDELE LIVESTOCK COMPANY, INC., and ROGER BLANCHARD, P&S Docket No. 6522. Order issued July 18, 1985.

Order issued by Edward H. McGrail, Administrative Law Judge.

SUPPLEMENTAL ORDER

On May 31, 1985, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act for a period of 14 days and thereafter until such

time as it demonstrates that the deficiency in its Custodial Account for Shippers' Proceeds has been eliminated.

Respondent has served the 14 day suspension and complainant has now received information that the deficit in the respondents' "Custodial Account for Shippers' Proceeds" has been eliminated. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued May 31, 1985, is terminated. The order shall remain in full force and effect in all other respects.

In re: TONY BOTT. P&S Docket No. 6482. Order issued August 9, 1985.

Order issued by John A. Campbell, Administrative Law Judge.

SUPPLEMENTAL ORDER

On May 29, 1985, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations.

Respondent has now registered to operate as a salaried dealer to purchase livestock for slaughter purposes only under the Act, a position for which the Act and the regulations do not require a bond or its equivalent. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued on May 29, 1985, is modified to allow respondent to operate solely as a salaried buyer to purchase livestock for slaughter only. The order shall remain in full force and effect in all other respects.

REPARATION DECISIONS

PLATTE VALLEY LIVESTOCK, INC. *v.* LLOYD ENGLEMAN and DONNA ENGLEMAN. P&S Docket No. 6544. Decided August 5, 1985.

Dealer—Insufficient funds checks—Failure to pay when due—Order for the payment of money—Default.

Complainant, *pro se*
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DEFAULT DECISION AND ORDER

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 *et seq.*), instituted by the filing of a formal complaint on March 26, 1985. Complainant alleges that it sold a total of 111 head of livestock to respondents on two dates and that respondents issued an insufficient funds (NSF) check for one group of livestock and failed to pay for the other group of livestock. The amount claimed was \$19,553.80.

Copies of the complaint and of the investigative report prepared by the Packers and Stockyards Administration of the Department and filed in this proceeding pursuant to the rules of practice (9 CFR § 202.14(c)) were served on respondents on April 30, 1985.

At the time of service of the copies of the complaint and investigative report, respondents were notified that an answer thereto should be filed within 20 days after such service and that failure to file an answer would be deemed an admission of the allegations contained in the complaint which would result in the issuance of a default order without oral hearing, as provided in the rules of practice at 9 CFR § 202.106(d). No answer was filed by respondents.

The failure of respondents to file an answer within the specified time limit is deemed an admission of all the allegations of the complaint and a consent to the issuance of a final order in the proceeding, based on all the evidence in the record, including information contained in the investigative report.

On the basis of the record, it is found that on February 21, 1985, respondents purchased 104 head of livestock from complainant and in purported payment thereof, issued a check for \$28,002.93 which was returned unpaid because there were insufficient funds in the account on which the check was drawn to pay the check when presented. It is further found that on March 12, 1985, respondents purchased 7 cows from complainant for the amount of \$2,550.13, which were not paid for. It is further found that the debt of respondents for the livestock herein described was reduced by applying commissions respondent Lloyd Engleman had earned at complainant's

market; by the respondent's selling 18 head of their livestock being sold by complainant and the proceeds being applied to reduce the debt, and by respondents making a partial payment of \$4,500.00, for a reduction of \$10,999.26 to the amount owed. It is further found that at the time respondents were engaged in business as a dealer buying and selling livestock for their own account in commerce and so registered with the Secretary under the Act. It has been consistently held that failure to pay and failure to pay, when due, for livestock, constitutes an unfair practice under section 312(a) of the Act (7 U.S.C. § 213(a)). *Mid States Livestock, Inc., Dale E. Van Wyk and Gordon Reisinger*, 37 Agric. Dec. 547 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978). It has been held that under such circumstances the Act authorizes a reparation order. *Rice v. Wilcox*, 680 F.2d 586, 39 Agric. Dec. 883 (8 Cir. 1980).

The Act provides a 90-day time limit for filing such complaints. Complainant filed its complaint within the limit.

The decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, 42 F.R. 4395, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953 (5 U.S.C., 1976 E., appendix p. 764). It constitutes "an order for the payment of money" within the meaning of section 309(f) of the Act (7 U.S.C. § 210(f)).

Under that section if respondent does not comply with this order within the time limit in this order, complainant may within one year of the date of this order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of respondent, or in any state court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and this order in the premises. That section further provides that such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders herein shall be *prima facie* evidence of the facts herein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. That section further provides that, if the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

It is requested that copies of all pleadings filed by any party in any such suit be filed with the Hearing Clerk, USDA, Washington, D. C. 20250, for inclusion in the file on this reparation proceeding. It is further requested that if the construction of the Act, or the

jurisdiction to issue this order, becomes an issue in any such suit, prompt notice of such fact be given to the Office of the General Counsel, USDA, Washington, D. C. 20250.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see rule 17 of the Rules of Practice, 9 CFR § 202.117, 43 F.R. 30517, July 14, 1978.

On a respondent's right to judicial review of such an order, see *Malv Livestock Commission v. Hardin et al.*, 446 F. 2d 4, 30 A. D. 1063 (8 Cir., 1971). On a complainant's right to judicial review of such an order, see 5 U.S.C. 702-3 and *United States v. ICC*, 337 U.S. 426.

ORDER

Within 30 days of the date of this order, respondent shall pay to complainant the sum of \$19,553.80 plus interest thereon at the rate of 13% per annum from May 1, 1985, until paid.

Copies hereof shall be served upon the parties.

COURT DECISIONS

In re: FRESH APPROACH, INC., DEBTOR. Case No. 385-30298-F-11. Decided July 25, 1985. (USDA-PACA Docket No. 2-6760)

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

Hon. John C. Ford, United States Bankruptcy Judge.

MEMORANDUM OPINION

On February 13, 1985, Fresh Approach, Inc. (hereinafter "Debtor"), filed its petition for relief under Chapter 11 of the Bankruptcy Code. Debtor operated, and continues to operate as Debtor-in-Possession, a market featuring a variety of fresh produce and other groceries. In the course of its operations Debtor had for several years purchased produce from Standard Fruit and Vegetable (hereinafter "SF&V"). Just prior to the filing of its petition for relief, Debtor ordered and received a number of shipments of various perishable commodities from SF&V. Unfortunately, Debtor's financial circumstances were such that SF&V's invoices remained unpaid long after they became due. SF&V demanded payment but received no response. Fearing that its claim might be considered subordinate to claims of Debtor's secured creditors in bankruptcy proceedings, SF&V sought to invoke the trust provisions of Perishable Agricultural Commodities Act of 1930, as amended in 1984. See 7 U.S.C. 499(e)(c). Notice was sent to Debtor and to the Secretary of Agriculture, pursuant to the terms of the statute, on December 5, 1984. On February 19, 1985, SF&V filed its Motion for Relief from Stay and for Turnover of Property Not Part of Debtor's Estate, alleging *inter alia* that the transactions giving rise to SF&V's claim occurred after and were controlled by the amendments to the PACA. Debtor opposed the motion on the grounds that the amendments were not self-implementing, that the implementing regulations took effect on December 20, 1984, and that because the transaction in question preceded this date, SF&V was not eligible to invoke the trust provisions of the amendments. Both parties cite statements in the legislative history of the amendments in support of their contentions.

On April 30, 1985, this Court entered an opinion holding that the 1984 PACA trust amendments applied to the transactions underlying SF&V's claims, and that Debtor's produce related inventory and proceeds thereof were to be considered held in trust for the benefit of SF&V. See *In re Fresh Approach, Inc.*, 48 B.R. 926, 12 B.C.D. 1365 (Bkrtcy. N.D. Tex. 1985). Said inventory was therefore not to be considered property of the estate, and was to be turned

over to SF&V upon final determination of the extent to which SF&V's claims were eligible under the PACA amendments.

On June 6, 1985, trial was held, over Debtor's objections as to this Court's jurisdiction and despite Debtor's motion for continuance, to determine the amount of SF&V's claim against the trust assets. This opinion represents findings of fact and conclusions of law resulting from the Court's consideration of the evidence and arguments presented at that trial.

A. Withdrawal of Reference

At the outset, it must be noted that Debtor has raised questions concerning the ability of this Court to resolve the factual and legal issues that have been and likely will be raised. Shortly before trial, and approximately sixteen days after the Court found the trust provisions of the 1984 PACA amendments applicable to these transactions, Debtor filed its motion for removal (in substance, a motion for withdrawal of reference) pursuant to 28 U.S.C. 157(d). This statute, enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (hereinafter "BAFJA"), P.L. 98-353 (1984), provides, in pertinent part,

The district court shall, on timely motion of a party, . . . withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

While the terms of this provision leave little doubt that it is the district court, and not the bankruptcy court, which is to determine whether a particular proceeding shall be withdrawn, two points are worthy of mention. First, it would appear that the PACA trust provision is not a statute "regulating organizations or activities." Use of the word regulating would appear to imply a function of a governmental unit with respect to the preservation or enforcement of a *public* right. The PACA trust creates a *private* right of action, and gives produce creditors an opportunity to protect and preserve their own *private* rights to payment. The Court further notes the following excerpt from the admittedly scanty legislative history of the debate in the House of Representatives concerning Section 157(d).

Mr. KRAMER: I note that the gentlemen's amendment at section 104(a) creates a new section 157 in the Bankruptcy Code. . . . My question is this: the language "activities affecting interstate commerce" is very broad language. What

kinds of situations or circumstances does the gentleman intend to cover here? Or will this language become an escape hatch through which most bankruptcy matters will be removed to a district court?

Mr. KASTENMEIER: I thank the gentleman for his question. This language is to be construed narrowly. It would, for example, mean related causes which may require consideration of both title 11 issues and other Federal laws involving the National Labor Relations Act, civil rights laws, Securities and Exchange Act, civil rights laws, Securities and Exchange Act of 1934, and similar laws.

130 CONG.REC. H. 1850 (daily ed. March 21, 1984).

As explained more fully below, this is not a "related" proceeding as that term is used in BAFJA. Rather, this is a core proceeding, arising under Title 11. Moreover, the examples cited by Representative Kastenmeier in his explanation of Section 157(d) provide for active intervention by governmental agencies occupying a watchdog role pursuant to a regulatory mandate. While PACA does direct the Secretary of Agriculture to promulgate regulations and under certain circumstances, play an active role, the trust provisions of the 1984 PACA amendments require no such activity. A issue here is a private action between two private entities, and no a regulatory action by the Department of Agriculture.

Second, the Court notes that a motion to withdraw reference must be timely. No standards are set forth in the statute for the definition of a "timely" motion to withdraw. There is some indication, however, that motion to withdraw reference should not be used as a vehicle to protract litigation and delay controversies.

The district court should refuse withdrawal if withdrawal would unduly delay administration of the case, considering the status of the case, the importance of the proceeding to the case, and the relative caseloads of the district court and bankruptcy judge.

130 CONG.REC. S. 6081 (daily ed. June 19, 1984). Debtor seeks to withdraw on the basis that this Court is not empowered to consider the Bankruptcy Code in conjunction with PACA, yet Debtor did not file its motion until sixteen days after this Court's decision resolving the legal questions requiring consideration of the Code and a law of the United States which arguably regulates activities affecting interstate commerce. SF&V filed its motion some sixty-five days before the Court rendered its opinion, and Debtor filed its response more than twenty days before this Court's decision. At no

time prior to the decision did Debtor seek or even discuss withdrawal of reference. The motion was not filed until two weeks after the very event Section 157(d) was allegedly intended to avoid. Under the circumstances, it can hardly be said that Debtor's motion is timely. "(I)f a motion for withdrawal of reference is not timely made, it will almost certainly be held that the provisions of the second sentence of section 157(d) have been waived." 1 *Collier on Bankruptcy* ¶3.01(e) (15th ed.1984). Cf. *Matter of Baldwin United Corporation*, 43 B.R. 889 (Bkrtcy. S.D. Ohio 1984).

These matters, as stated earlier, are fodder for digestion by a higher authority. They are significant, however, in the resolution of another threshold question, i.e., whether this Court can or should proceed with the matters at issue during the pendency of a motion to withdraw reference. Debtor has filed a motion for continuance on precisely this basis. SF&V has opposed a continuance, but has cited no authority.

This Court has found no caselaw addressing Debtor's contentions. It must be noted, however, that the 1984 amendments dealing with bankruptcy procedure and jurisdiction were essentially modeled after the emergency rules adopted by every district court in the wake of *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 458 U.S. 50 (1982). Consequently, the provisions of those rules and the caselaw thereunder is worthy of some consideration.

The Local Rule of the Northern District of Texas Concerning Bankruptcy Cases and Proceedings, filed December 23, 1982, stated in pertinent part,

The reference to a bankruptcy judge may be withdrawn by the district court at any time on its own motion or on timely motion of a party. *A motion for withdrawal of reference shall not stay any bankruptcy proceeding before a bankruptcy judge unless a specific stay is issued by the district court.*

(Emphasis added). In *In re B.T. Wilson Drywall Construction, Inc.*, 36 B.R. 439 (E.D. Ark. 1983), a secured creditor moved for withdrawal of reference and asserted that such a motion automatically effected removal of all pertinent issues from the bankruptcy court to the district court. The court, operating under a local rule identical to that set forth above, stated that the purpose of the rule was to take advantage of the special expertise of the bankruptcy courts pending a determination by the district court, and to generally expedite proceedings. Accordingly, the court determined that the

motion to withdraw reference did not deprive the bankruptcy court of its jurisdiction over pending proceedings.

Unfortunately, this Court is not presented in Section 157(d) with guidelines as specific as those set forth in the emergency rule. An argument may be made that the absence in BAFJA of a provision present in the emergency rules indicates a Congressional desire to consciously eliminate that provision. *See, e.g., In re Baldwin-United Corporation*, 12 B.C.D. 913 (Bkrcty. S.D. Ohio 1985) (absence of proscription against jury trials in BAFJA, following presence of proscription against jury trials in emergency rules, an important factor in upholding power of bankruptcy courts to hold jury trials). Indeed, the local rule promulgated by the district courts of the Northern District of Texas following enactment of BAFJA provides only that

any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 . . . be and they hereby are referred to the Bankruptcy Judges of this district for consideration and resolution consistent with law. It is further ordered that the Bankruptcy Judges for the Northern District have been, and they hereby are, directed to exercise the authority and responsibilities conferred upon them as Bankruptcy Judges by (BAFJA) and this court's order of reference. . . .

It may thus be surmised that this Court is not awash with guidance. Looking again to the precise terms of Section 157(d), the Court notes that a proceeding will be withdrawn "if the court determines" that withdrawal is appropriate. The statute thus implies that the determination must precede actual withdrawal, and that until the determination is made the case is not withdrawn. If the proceeding is not withdrawn, it remains before the bankruptcy court, and there would seem to be no basis to stay further proceedings in the bankruptcy court. This is particularly true given the Court's estimate of the decision likely to be reached by the district court. Accordingly, this Court will, and hereby does, deny Debtor's motion for continuance, and will proceed with the resolution of the remaining issues.

B. Core Proceedings

Debtor filed, on the day of trial, a "Notice of Intention to Invoke Section 157(c)", by which Debtor indicated its refusal to consent to the entry by this Court of final judgment in these matters, apparently on the basis of Debtor's assertion that this is not a core pro-

ceeding and that this Court is therefore without power to enter a final order absent consent of the parties. SF&V suggested at trial that this is a core proceeding because it is an action to turnover property, apparently relying upon Code Section 542, and is therefore a proceeding arising under title 11. Although this Court finds SF&V's reliance upon section 542 without merit and completely inapposite, the Court nonetheless concludes that these proceedings are core proceedings and that any order set forth herein is final.

One of the most confusing aspects of BAFJA is the attempt in 28 U.S.C. 157 to define the jurisdiction of the bankruptcy court consistent with the principles announced in the *Marathon* decision. The subsection to which Debtor refers, 28 U.S.C. 157(c), states, in pertinent part,

A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district court after considering the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters to which any party has timely and specifically objected.

By contrast, a bankruptcy court has the power and the duty to enter a final judgment in proceedings which qualify as core proceedings. See 28 U.S.C. 157(b)(1). A laundry list of core proceedings is provided by the statute, including "orders to turn over property of the estate." It is upon the latter provision, presumably in combination with Code section 542, that SF&V rests its contention that this dispute is a core proceeding. The Court notes first that both Section 542 and Section 157(b)(2)(E) refer to orders regarding turnover of "property of the estate". SF&V has continuously asserted, and this Court has found, that the produce related assets held in trust by Debtor are not property of the estate. The sections cited by SF&V could not, by their terms, apply to this case, as they are concerned only with the turnover of property of the estate by third parties. Moreover, the turnover contemplated by these sections is *to*, rather than *from*, the debtor. Were this the only basis for evaluating the core-noncore character of these proceedings, Debtor's "notice" would effectively deprive this Court of the ability to make a final determination.

There are, however, three additional bases not cited by SF&V but nonetheless recognized by this Court, for concluding that this is a core proceeding. First, Section 157(b)(2)(G) specifies that motions

for relief from the automatic stay are core proceedings. SF&V's motion was styled as a motion to lift the stay, and the property against which SF&V seeks to enforce its claims is held by Debtor. Bankruptcy Code Section 362(a)(3) stays "any act to obtain possession of . . . property *from* the estate. . . ." (emphasis added). Because Debtor therefore has, at the least, a possessory interest in the property at issue, relief from the stay was a prerequisite to any further action by SF&V. Debtor contends, however, that SF&V's motion is a wolf in sheep's clothing, i.e., an action for a declaratory judgment disguised as a motion to lift the stay. Consequently, this matter should have been brought as an adversary proceeding, under Bankruptcy Rule 7001, rather than as a contested matter under Rule 9014, and is not properly a core proceeding. While there may be some merit to Debtor's argument, there remain other grounds upon which SF&V could have built an argument, and upon which this Court bases its decision.

In addition to the specifically enumerated examples of core proceedings under new Section 157, there exists a residual category, Section 157(b)(2)(O), which includes as core matters "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims." It should be obvious that the present proceeding is one which adjusts the debtor-creditor relationship, and which is therefore a core proceeding under the foregoing provision. In *In re Richmond Children's Center, Inc.*, 49 B.R. 262 (S.D. N.Y. 1985), the movant sought turnover of funds held by the debtor and allegedly subject to a state law constructive trust in favor of movant. Holding that the proceeding was a core proceeding, the court stated that "[t]he instant action for a constructive trust is akin to those 'matters concerning the administration of the estate' and 'proceedings affecting . . . the adjustment of the debtor-creditor . . . relationship' which are set forth as examples of core proceedings in which bankruptcy judges may enter dispositive orders and judgments." 49 B.R. at 264. While the case at bar is concerned with a federal statutory trust, as opposed to a state law constructive trust, it remains clear that this is a core proceeding under Section 157(b)(2)(O).

The decisions construing Section 157 seem to indicate a judicial inclination to resolve doubt as to core-noncore status in favor of classification of a matter as a core proceeding. *See, e.g., In re Lion Capital Group*, 12 B.C.D. 840 (Bkrtcy. S.D. N.Y. 1985); *In re Criswell*, 12 B.C.D. 653 (Bkrtcy. E.D. Va. 1984); *In re Lawson*, 12 B.C.D. 62 (Bkrtcy. E.D. Ky. 1984). There is support for this inclination in

the legislative history, in which noncore proceedings are consistently referred to as a "narrow range" of matters. *See* 130 CONG. REC. H7494 (daily ed. June 29, 1984) (remarks of Rep. Kastenmeier). At least two commentators have read the provisions of section 157 to give the bankruptcy courts the authority to render a final decision, subject to normal standards of review (as opposed to the *de novo* standard in noncore cases) in any matters "arising under" title 11. *See* Hendel and Reinhardt, *Evolution of Bankruptcy Court Jurisdiction after the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 90 Com. L. J. 272 (1985); Kamp, *Court Structure Under the Bankruptcy Code*, 90 Com. L. J. 203 (1985). Although this provision was never cited by SF&V, the Court notes that the relief requested herein falls within the parameters of Bankruptcy Code section 541(d), which defines the extent to which property, legal title to which is held by debtor but equitable title to which is held by others, is property of the estate.

Here, of course, Debtor has what amounts to legal title, by virtue of its possession of the produce inventory and proceeds thereof, and as discussed below and in this Court's previous ruling, SF&V holds an equitable interest in those assets. This is precisely the situation contemplated by Section 541(d). As a result, this proceeding is a matter arising under Title 11, and is therefore a core proceeding. *Cf. In re Martin Fein & Company, Inc.*, 43 B.R. 623, 628-9 (Bkrtcy. S.D. N.Y. 1984); *In re Kaiser*, 722 F.2d 1574, 1582 (2d Cir. 1983); *In re Cohn Brothers, Inc.*, 45 B.R. 723, 725 (Bkrtcy. M.D. Penn. 1985).

C. PACA Trust Assets are not Property of the Estate

As noted above, this proceeding is a core proceeding by virtue of Bankruptcy Code Section 541(d), which states, in pertinent part,

Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, *but not to the extent of any equitable interest in such property that the debtor does not hold*.

11 U.S.C. 541(d) (emphasis added).

This Court previously held that the provisions of the 1984 PACA amendments allow for the creation of a trust for the benefit of unpaid produce creditors, such as SF&V, so long as such beneficiaries perfect their interests pursuant to the statute or its implementing regulations.¹ This Court has also determined that SF&V

¹ *In re Fresh Approach*, 48 B.R. 926 (Bkrtcy. N.D. Tex. 1985).

perfected its interest in this trust in December, 1984, approximately sixty days prior to the entry of an order for relief in this case, and that the produce related assets (and proceeds thereof) which formed the corpus of said trust would not be considered property of the estate.² That the corpus of a trust is not property of the estate is so widely accepted as to be beyond dispute.

The rule is elementary that the estate succeeds only to the title and rights in the property that the debtor possessed, although the trustee is armed, of course, with the special rights and powers conferred upon him by the Code itself. Therefore . . . , the estate will generally hold such property subject to the outstanding interest of the beneficiaries.

4 *Collier on Bankruptcy*, 541.13 at 541-66 (15th ed. 1983). See *Georgia Pacific Corporation v. Sigma Service Corporation*, 712 F.2d 962, 968 (5th Cir. 1983); *Matter of Quality Holstein Leasing*, 752 F.2d 1009, 1012 (5th Cir. 1985); *In re Kennedy & Cohen, Inc.*, 612 F.2d 963, 965 (5th Cir. 1980), cert. den. sub. nom. *Wisconsin v. Reese*, 449 U.S. 833 (1980). As a result, the beneficiary of such a trust would be entitled "to priority in payment as to all the assets of the bankrupt, ahead of the claims of creditors who have valid security interests, ahead of the administrative costs and expenses incurred in this court and ahead of all other priority and general creditors." *In re Kennedy & Cohen, Inc.*, *supra*, at 965.

Seizing upon these principles, SF&V seeks to recover from Debtor's inventory, or the proceeds thereof, the amount of its interest in the trust. Debtor, with help from the unsecured creditors' committee, protests, citing the legislative history of the 1984 PACA amendments³ for the proposition that the trust is a "floating" trust, that Debtor is entitled to the use of said assets in the ordinary course of its business, and that the interest asserted by SF&V may be treated, albeit in full, under the plan of reorganization. Not surprisingly, SF&V is not overly enamored of this proposal, and wants immediate payment.

Because of the youth of the PACA amendments, there is a dearth of caselaw regarding the interplay of PACA and the Bankruptcy Code. Consequently, this Court has often found itself sailing hither-to uncharted waters, and has relied frequently upon analogies drawn to similar rights and circumstances involving other statutes and doctrines. For example, much has been written about the

² *Id.*

³ H.R. Rep. No. 98-543, 98th Cong., 1st Sess. 4 (1983), reprinted in 1984 U.S. Code Cong. & Admin. News 407.

rights of beneficiaries of constructive trusts comprising assets held by debtors or trustees in bankruptcy. The cases have consistently held that the estate's interests are subordinate to the claims of beneficiaries. Provided the latter can satisfactorily prove their entitlement, it seems well settled that their demands for payment must be honored. "(T)he trustee (may be required) to turn over to the beneficiary of a state law constructive trust the property that the debtor holds subject to such a trust . . . (t)he debtor retains legal title, but the constructive trust beneficiary may reclaim in full his equitable interest in bankruptcy proceedings." *Matter of Quality Holstein Leasing, supra* at 1012 (citing *Georgia Pacific*, 712 F.2d at 968).

Another landmark by which this Court has sought to navigate has been the trust provision of the Packers and Stockyards Act, 7 U.S.C. 196, (PSA) and cases thereunder.⁴ Interestingly, this ancestor of the PACA trust in dispute in the instant case was expressly mentioned by Congress in its analysis of Bankruptcy Code Section 541(d).

Situations occasionally arise where property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another. For example, if the debtor has incurred medical bills that were covered by insurance, and the insurance company had sent the payment of the bills to the debtor before the debtor had paid the bill for which the payment was reimbursement, the payment would actually be held in a constructive trust for the person to whom the bill was owed. (Section 541) . . . also will not affect various statutory provisions that give a creditor of a debtor a lien that is valid outside as well as inside bankruptcy, or that creates a trust fund for the benefit of creditors of the debtor. See *Packers and Stockyards Act section 206, 7 U.S.C. 196*.

H.R. Rep. No. 95-595, 95th Cong. 1st Sess. (1977) 368, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5868 (emphasis added).

This express exclusion of trust assets from property of the estate indicates that Congress intended a priority scheme consistent with that applied in cases of judicially imposed constructive trusts, i.e. that assets subject to the PSA (and by analogy, the PACA) trust were not property of the estate and were subject to distribution outside the distribution contemplated in bankruptcy. In *In re*

⁴ Congress directed courts to look to caselaw developed under PSA for guidance as to proceedings arising under PACA. See note 8 *supra*.

Gotham Provision Company, Inc., 669 F.2d 1000 (5th Cir. 1982) this principle was applied in a consideration of the relative priorities of trust beneficiaries and secured claimants. "The Committee intended that the (PSA trust) be a constructive statutory trust arising by operation of law." 669 F.2d at 1012, footnote 14. The court affirmed rulings by the bankruptcy and district courts permitting the claimants to recover the unpaid balance from sales of livestock from the trust assets themselves, whether held in escrow by the debtor or paid over to a third party. Cf. *Matter of Harmon*, 11 B.R. 162, 166-7 (Bkrtcy. N.D. Tex. 1980).

Indeed, to hold otherwise would be to defeat the very purpose of the PSA and PACA trusts. Debtor contends that it should be permitted to retain the use and possession of the trust assets pending formulation and approval of a plan of reorganization, through which SF&V's claim would be satisfied. Leaving aside the speculative nature of this contention (i.e., Debtor operates under the yet untested assumption that a plan will be forthcoming and will be approved), it is clear that Debtor's scenario would at best grant F&V parity with the other creditors and administrative claimants. It is clear from the terms of the PACA amendments and from the supporting legislative history that Congress intended to create a priority status for unpaid produce claimants, priming even the administrative claims which normally stand first in line in a bankruptcy distribution. To approve a plan which grants anything but such a priority would be in direct contravention of the purpose and intent of the PACA amendments. It must be remembered that PACA was not enacted to protect those in Debtor's shoes, but rather to prevent the chaos and disruption in the flow of perishable agricultural commodities sure to result from an industry-wide proliferation of unpaid obligations. While in insolation this may seem a harsh course to follow, in the macroeconomic sense PACA serves to ensure continuity of payment and therefore survival of the industry. Congress has plainly decided it would be less disastrous to risk the liquidation of a single purchaser than to threaten the entire production chain with insolvency. It is not the function of this Court to pass upon the wisdom of that decision.

Of course, it is this Court's task to balance the rights of various claimants against the Bankruptcy Code's bias in favor of efforts to reorganize a debtor. In this case, assuming Debtor's plan proposed to pay SF&V the indubitable equivalent of its interest in the trust assets, with due regard for the time value of money, an argument could be made that SF&V would receive all that it could reasonably expect, under the circumstances. Such an argument might find support in *In Re Goldblatt Brothers, Inc.*, 33 B.R. 1011 (N.D.

III. 1983), where the court, after concluding that Debtor held certain funds as trustee for the claimant, awarded the claimant an administrative priority. This case can be distinguished, however, on two grounds. First, the claimant in *Goldblatt* requested only an administrative priority, whereas SF&V has requested immediate payment. Second, and more significant, *Goldblatt* dealt with an implied trust, i.e., the court determined from the course of dealing between Debtor and claimant that Debtor acted as a fiduciary for the claimant. In the case at bar, the terms of the trust are much more explicit. Congress has determined that prompt payment is necessary to assure the viability of the produce industry, and to the extent an administrative priority does not accomplish this goal it is clearly insufficient. It must be remembered that SF&V has creditors of its own that it must satisfy, and that SF&V is very likely as susceptible to imposition of a PACA trust as is Debtor. Even if Debtor proposes to pay a market rate of interest on an installment-based payout, SF&V's cash flow may still be in jeopardy.

Debtor has asserted that the use of the term "floating trust", coupled with language in the legislative history of the PACA trust amendments providing for use by a debtor of trust assets until the beneficiaries are paid, requires that SF&V await the distribution contemplated by Debtor's forthcoming plan of reorganization. It is apparent, however, that the "floating" characteristic of the trust was intended to refer not to time of disbursement but to assets subject to the trust. As regards use by a debtor of trust assets, it is plain that Debtor's construction of this term would rob the trust amendments of their effect and would in fact work to defeat their purpose. The clear language of PACA Section 499e and the corresponding legislative history dispel any reasonable doubt as to the Congressional intent involved. The PACA trust was designed to protect unpaid sellers of produce. It is well settled that a statute is to be construed so as to effectuate its purpose. *Environmental Defense Fund v. Tennessee Valley Authority*, 468 F.2d 1164 (6th Cir. 1972); *In re Frosty Morn Meats, Inc.*, 7 B.R. 988 (M.D. Tenn. 1980). It is altogether obvious that the PACA trust is intended to remedy the burdens on commerce in produce resulting from a failure of purchasers to pay for the produce received. To require produce sellers, such as SF&V, to wait in line, albeit at the head of the line would work precisely the sort of interruption of commerce the Congress intended to avoid. In the case at bar, Debtor filed its petition for relief approximately five months ago, and has been selling significant quantities of produce and other inventory on a daily basis, yet SF&V has received nothing from the bankruptcy estate. To date, no plan has been filed, and in informal discussions with

the Court and counsel for SF&V Debtor has proposed a year long pay out of SF&V's claim. Assuming no obstacles were met, such as meritorious objections to the plan or disclosure statement, SF&V would be forced to wait almost a year from the date its interest was perfected before receiving a single payment, and will have waited almost two years before its claim is satisfied in full. If SF&V has sufficient cash flow to survive this period, and if Debtor proposes to compensate SF&V for the loss of use of these funds in the interim, the Court would encourage SF&V to accept the proposal, as it would appear to be the least burdensome alternative with respect to Debtor's prospects for reorganization.⁵ This Court cannot, however, compel SF&V to accept such a proposal. The Court is of the opinion that SF&V is within its rights in demanding immediate payment. *See Matter of Quality Holstein Leasing, supra* at 1012.

D. The Tracing Requirement

It is worth mentioning, in the context of Debtor's demand that SF&V specifically trace assets to which the PACA trust applies, that the trust is imbued with an unusual "floating" characteristic, i.e., it applies to *all* of Debtor's produce related inventory and proceeds thereof, regardless of whether SF&V or another produce supplier was the source of such inventory. *See H.R. Rep. No. 98-543, 98th Cong., 1st Sess. 5 (1983), reprinted in 1984 U.S. Code Cong. & Ad. News 409. See also 7 CFR 46.46(c) (1984).* Congress surely was not blind to the probability that a purchaser of produce would have debts other than those incurred from *these* produce purchases. The legislative history emphasizes that no specific tracing of inventory or proceeds is required (nor, as a practical matter, could such tracing be accomplished). Looking again to the cases construing the PSA trust provisions, which served as the template for the PACA trust, it is clear that the PSA trust beneficiary is not required to carry the burden of tracing; indeed, it is the Debtor who must determine which assets, if any, are *not* subject to the trust. *In re Frost Morn Meats, Inc., supra* at 1013. *See also In re Gotham Provision Company, Inc., 669 F.2d 1000, 1011 (5th Cir. 1982)* ("The only burden on the cash sellers in such a case is to prove the balance due to them and the existence of a floating pool of commingled inventories of livestock products, accounts receivables, and proceeds derived from cash and credit livestock sales"). In the case at bar, there was, by the very nature of the business, such a commingling

⁵ Counsel for SF&V have repeatedly assured the Court that they do not seek Debtor's liquidation. The Court urges SF&V to accommodate Debtor to the extent possible to arrive at a mutually agreeable pay out plan that would not preclude Debtor's efforts to successfully reorganize.

of the produce received by Debtor that it would be virtually impossible for SF&V to specify which inventory was shipped by SF&V, and into which inventory the proceeds of produce shipped by SF&V was invested. Accordingly, this Court will impose no burden of tracing specific assets upon SF&V. Should a dispute arise, it will be the Debtor's burden to establish which, if any, assets are not subject to the PACA trust.

E. The PACA Trust as a Preference

Debtor has on several occasions expressed the opinion that the perfections by SF&V of its interest in the PACA trust amount to a preference subject to avoidance under 11 U.S.C. § 547. As of the date of trial, no adversary proceeding had been commenced by Debtor or any other party in interest to avoid or recover this allegedly preferential transfer. In the interest of finality of judgment, however, this Court will consider the possibility that SF&V's interest in the assets of the PACA trust may be avoidable as a preference.

Bankruptcy Code Section 547, upon which Debtor bases its defense to SF&V's claim, states in pertinent part

(T)he trustee may avoid any transfer of an interest of the debtor in property—

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made—

(A) on or within 90 days before the date of the filing of the petition; . . .

- (5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

In the case at bar, SF&V perfected its interest on December 5, 1984, and Debtor filed its petition for relief on February 13, 1985. The 90-day requirement of section 547(b)(4)(A) has therefore been

met. SF&V was without question a creditor, and its interest in the trust arose as a result of an antecedent debt owed by Debtor. By virtue of the presumption of section 547(f), Debtor was insolvent at the time SF&V's interest was perfected. SF&V will undoubtedly receive more as a result of its interest in the PACA trust than it would have received as a general unsecured creditor in a liquidation under chapter 7 of the Code. Some of the elements of a preferential transfer may therefore be present, should Debtor ultimately file an adversary proceeding against SF&V.

This is not to say that Debtor has satisfied *all* of the criteria under Section 547(b). It is well established that the Code requires a transfer "of an interest of the debtor in property" before a preference action may be maintained. *See, e.g., Brown v. First National Bank of Little Rock*, 748 F.2d 490, 491 (8th Cir. 1984). In the instant case, SF&V delivered produce to Debtor on several occasions prior to December 5, 1984, the date on which the interest was perfected. Close examination of the PACA trust provisions, however, indicates that SF&V's interest arose upon the date of delivery, rather than upon the date of perfection, and was therefore more in the nature of an interest retained by SF&V than an interest transferred by Debtor.

Perishable agricultural commodities received by a . . . dealer . . . and all inventories of food and other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, *shall be held by such . . . dealer . . . in trust* for the benefit of all unpaid suppliers or sellers of such commodities . . . until full payment of the sums owing in connection with such transactions have been received by such unpaid suppliers, sellers, or agents.

7 U.S.C. 499e(c)(2) (emphasis added). According to the clear terms of the statute, the inventory and proceeds subsequently derived therefrom was impressed with the trust *upon delivery* to Debtor. Because Debtor never held more than bare legal title to the inventory and proceeds, no transfer of the beneficial interest took place.

This conclusion is reinforced by the terms of the perfection provisions of the PACA trust amendments. "The unpaid supplier, seller, or agent *shall lose the benefits of such trust* unless such person has given written notice of intent to *preserve the benefits of the trust . . .*" 7 U.S.C. 499e(c)(3) (emphasis added). Congress did not use words indicating that the beneficial interest was *created* upon the giving of notice. Use of the words "shall lose" and "preserve"

plainly refer to rights or interests existing *prior to* perfection. The clear meaning of the preservation provisions is that a beneficiary's *pre-existing* beneficial interest would evaporate absent affirmative steps by such a beneficiary to protect such interests. In short, the beneficial interest arises, by operation of law, upon delivery to a dealer of qualifying produce, and said interest exists unless and until either the claim is satisfied or the beneficiary fails to take the necessary steps to perfect.

The significance of this determination is made clear upon re-examination of the precise terms of Bankruptcy Code section 547, which defines the characteristics of an avoidable preferential transfer. A threshold issue in any evaluation of the merit of preference claim (or in this case, a defense based upon allegations of a preference) is whether an interest of the debtor in property had been transferred to the creditor. *Brown v. First National Bank, supra*; *In re Tinnell Traffic Services, Inc.*, 48 B.R. 277, 278 (M.D.Tenn. 1984). In the instant case, Debtor never held the beneficial interest in the inventory; indeed, the beneficial interest was held since its inception by SF&V. It is thus apparent that no transfer took place, and therefore that no voidable preference has been established.

The same conclusion was reached, in connection with a state statutory trust, in *In re Casco Electric Corporation*, 28 B.R. 191 (Bkrtcy. E.D.N.Y. 1983), *aff'd* 35 B.R. 781 (E.D.N.Y.). The debtor in *Casco* was an electrical contractor working on a number of projects at the time it filed its petition for relief. As it received payment for work completed, the debtor deposited same in a general checking account, from which it subsequently paid its own bills for supplies, labor, etc. Under New York law, funds received by a contractor were, upon receipt, impressed with a trust for the benefit of subcontractors and suppliers. The funds received by the debtor in *Casco* were therefore held in trust, just as the produce received by Debtor in the case at bar were held in trust.

The trustee in *Casco* filed an adversary proceeding against recipients of payments out of the debtor's general checking account, the same account which contained funds impressed with the state law trust. The recipients defended on the ground that no preferential transfer could be proven, as the money received had never been property of the estate under Code section 541(d). The court agreed, finding that as between the trustee and the recipients, who were beneficiaries under the trust, the latter had superior right to the trust funds during the preference period.

(T)he burden lies on the trustee to establish every element of a preference, including the fact that the money given it

constituted property of the debtor. If the money represented assets of the statutory trust created by New York's Lien Law in (defendant's) favor its receipt by (defendant) was not a preference.

28 B.R. 195. Of course, in the case at bar SF&V simply took steps, admittedly within the preference period, to perfect and preserve its pre-existing right to payment. Debtor has suggested that certain payments were made during the preference period, an allegation which has not been proven, but to the extent such payments represented assets of the statutory trust impressed by PACA, they were clearly not preferential transfers. Here, as in *Casco*, to order the return of such payments as may have been made, or to negate perfection by SF&V of its pre-existing beneficial interest, would defeat the purpose of the underlying statute, in this case the 1984 PACA trust amendments.

The result most congruent with the legislative intention in enacting the Bankruptcy Code, which was to respect statutory trusts . . . and to defer to the public policy behind such laws, is not to apply the preference section of the Code to payments made (to beneficiaries) within the preference period, unless demonstrated *not* to be paid out of monies received from (trust assets).

28 B.R. at 195. Cf. *In re Razorback Ready-Mix Concrete Company*, 45 B.R. 197, 922 (E.D. Ark. 1984) (funds paid to IRS from F.I.C.A. withholding were not property of the estate, and therefore no preference was established); *Wickes Boiler Company v. Godfrey-Keeler Company*, 116 F.2d 842, 844 (2d Cir. 1940) (Bankruptcy priorities apply only to property of the estate, and not to trust funds of which third parties are the beneficial owners); *Selby v. Ford Motor Company*, 405 F.Supp. 164, 173 (E.D. Mich. 1975), *aff'd* 590 F.2d 642, 649 (statutory trust funds are not the property of the debtor and are not subject to the preference provisions of the Bankruptcy Code). Consequently, neither SF&V's actions to perfect and preserve its pre-existing beneficial interest in the PACA trust, nor any payments derived from PACA trust made within the preference period, could be avoided by Debtor under Code section 547(b). For purposes of SF&V's motion, and without prejudice to any actions Debtor may hereafter bring, this Court holds that the preference allegations in Debtor's response will not defeat SF&V's rights to enforce its claim against assets subject to the PACA trust.

F. Produce in Interstate Commerce

Debtor has repeatedly asserted, and cited authority from which it purports to infer, that the transactions in question were not in interstate commerce, as that term is defined in PACA, and therefore were not subject to the PACA trust provisions. This Court has not addressed the interstate commerce question in the two previous memoranda, and will hasten to do so now.

According to the evidence presented at the hearing, and the allegations set forth in the parties' pleadings, SF&V purchased, in the normal course of its business, a variety of perishable agricultural commodities from a number of sources within and without the state of Texas, for ultimate distribution within the city of Dallas. Debtor contends that SF&V purchased such commodities for its own account, brought them to the SF&V warehouses in Dallas, and held them for subsequent sale to various retailers in the Dallas area. Debtor claims that these warehouses were termini, for purposes of ascertaining the extent to which subsequent sales were in the stream of interstate, as opposed to purely intrastate, commerce. Because the produce was in Dallas before Debtor indicated an interest therein, and was shipped from a point in Dallas to another point in Dallas, Debtor finds no justification for describing such trade as "interstate commerce". SF&V, of course, is not inclined to accept this view.

The relevant definition of interstate commerce, by which the PACA trust provisions are triggered, states in pertinent part

A transaction in respect of any perishable agricultural commodity shall be considered in interstate . . . commerce if such commodity is part of that current in commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one state with the expectation that they will end their transit, after purchase, in another . . .

7 U.S.C. 499a(8). Not surprisingly, given the similarity of purpose of the statutes, the PACA definition of interstate commerce closely tracks the definition set forth in its progenitor, the Packers and Stockyards Act. The latter definition states, in pertinent part

(A) transaction in respect to any article shall be considered in commerce if such article is part of that current in commerce usual in the livestock and meat packing industries, whereby (such commodities) are sent from one State with

the expectation that they will end their transit, after purchase, in another . . .

7 U.S.C. 183. As this Court has noted earlier ⁶, Congress has clearly indicated that precedents established under PSA may be relied upon when construing the provisions of PACA. In *Folsom-Third Street Meat Company v. Freeman*, 307 F.Supp. 222 (N.D. Cal. 1969), a number of wholesalers sought to enjoin the Secretary of Agriculture from applying certain record keeping provisions of the PSA. The plaintiffs purchased meat from suppliers within and without the state of California, although it appeared that the majority of such purchases were made from suppliers within the state. Many of the California suppliers had themselves purchased from sources without the state. The court was thus confronted with the issue of whether the plaintiffs were engaged in interstate commerce as defined by the PSA. After briefly tracing the development of the concept of "interstate" commerce, the court concluded that plaintiffs were indeed subject to regulation as participants in interstate commerce as defined in PSA. "(M)uch of the meat purchased by plaintiffs from California sources has in turn come from out-of-state sources, thus affecting commerce and rendering in subject to the Congressional power to regulate interstate commerce." 307 F.Supp. at 226. In the case at bar, Debtor has purchased produce from SF&V, to be shipped from a warehouse in Dallas to Debtor's retail outlets in the same city. The evidence has clearly shown, however, that the majority of said produce had originally come from out-of-state sources. Interstate commerce was therefore affected, and the transactions were properly subject to Congressional regulation. Cf. *Safeway Stores, Inc. v. Freeman*, 369 F.2d 952 (D.C. Cir. 1966); *United States v. Tyson's Poultry, Inc.*, 216 F.Supp. 58, 61-2 (W.D. Ark. 1963) (PSA covers "not only commercial activities which are a part of interstate commerce but also those activities which are a part of that current of interstate commerce usual in the meat packing and poultry industries"). Under the guidance provided by the PSA cases, then, Debtor was clearly a purchaser in interstate commerce as contemplated by PACA.

This conclusion is entirely consistent with the wealth of case law concerning the scope of Congressional power to regulate activities affecting interstate commerce. For example, in *Park 'N Fly of Texas, Inc. v. City of Houston*, 327 F.Supp. 910 (S.D. Tex. 1971), a parking company and a car rental company complained that an ordinance of the city of Houston, which restricted the use and avail-

⁶ See *In re Fresh Approach*, 48 B.R. 926 (Bkrcty. N.D.Tex. 1985).

ability of shuttle buses at Houston's Intercontinental Airport, placed them at a competitive disadvantage because the shuttles owned and operated by the city were not similarly restricted. The plaintiffs argued that the ordinance effectively imposed an undue burden on interstate commerce.

In response, the city asserted that the ordinance could not possibly burden interstate commerce, as the plaintiffs were engaged in activities wholly confined to the city limits. The court, however, noted that "(i)nterstate commerce is an intensely practical concept, and the characterization of one portion of a journey must be made by viewing the logical relation of that portion of the entire journey." 327 F.Supp. at 920. Although a particular activity might, by itself, be conducted entirely within the borders of a single state, its effect or dependence upon activities taking place in other states could very well bring it within the scope of interstate commerce.

(T)he practical concept of interstate commerce may necessarily at times include travel occurring wholly within one state (i)t is easily discernible that the beginning and end of interstate commerce are not drawn by arbitrary lines, but by practical effect.

327 F.Supp. at 920-21. Citing *United States v. Yellow Cab Company*, 332 U.S. 218, 228 (1947), the court acknowledged that

(w)hen persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character.

Id. In the case at bar, Debtor was one of the intermediaries in the stream of commerce flowing from the producers in various states to the consumers in Dallas, Texas. While it is true that a segment of that stream was wholly within the state of Texas, i.e., from SF&V to Debtor, it cannot reasonably be denied that all parties contemplated a transaction having the practical effect of providing access for Texas consumers to produce grown in other states. Had the purchases by Debtor been an unusual occurrence, not previously contemplated by SF&V or the producers, Debtor might have a stronger argument. Here, however, Debtor knew the source of its produce; indeed, it can be fairly inferred that Debtor intended to acquire its inventory from those sources. In addition, Debtor has not addressed the question of whether its own customers are strictly Texans, or whether some of its clientele may in fact be from other states. Debtor is not the ultimate consumer of the items at

issue here, and may itself be a mere conduit for the flow of goods through interstate commerce. In any case, it is well established that the power of Congress to regulate reaches the activities of handlers of goods even after they come to rest within a particular state. *See, e.g., Futrell v. Columbia Club Inc.*, 338 F.Supp. 566, 569 (S.D. Ind. 1971).

As the evidence pointedly shows, however, this Court need not invoke the general principles of the scope of permissible Congressional regulation to support the conclusion that the transactions at issue were in interstate commerce. Mr. Morris Rutchik, the vice president of SF&V, testified at the hearing and via affidavit that the produce delivered to Debtor was obtained from out of state sources, and that the transactions involved were typical, not only in the industry, but the course of dealing between Debtor and SF&V. Mr. Rutchik's testimony is bolstered by the finding of a representative of the Department of Agriculture that a majority of the produce purchased by Debtor in the transactions at issue was in the stream of interstate commerce. Moreover, in correspondence filed with this Court, the Department has made clear its satisfaction that sufficient produce was purchased from vendors without the state of Texas to justify application of the PACA licensing provisions. In fact, Debtor has itself implicitly acknowledged that, in the ordinary course of business, it is a participant in the interstate produce market, as made clear by Debtor's previous PACA license and pending license application. Taken together, the circumstances virtually compel a finding that this transaction was "part of that current in commerce usual in the trade . . . whereby such commodity and/or the products of such commodity are sent from one state with the expectation that they will end their transit, after purchase, in another." 7 U.S.C. 499a(8).

It remains to be determined, however, whether SF&V's contention that all \$106,000 worth of produce delivered to Debtor was furnished by out of state producers is accurate. Debtor, of course, will not concede that any of the produce was shipped into Texas.⁷ The Department of Agriculture has expressed sufficient doubt as to the figure claimed by SF&V to lower its own estimate to \$97,934.75.⁸ Mr. Rutchik testified at the June 6 hearing that, in his opinion, the entire amount claimed represented qualifying produce shipped

⁷ To no one's surprise, and to his credit, counsel for Debtor has fought SF&V in every way imaginable, and has even asserted that Debtor never received the produce at issue.

⁸ Letter from Dennis Becker, Deputy Assistant General Counsel, United States Department of Agriculture, to Court (April 1, 1985) (discussing applicability of PACA and amount of eligible claim).

across state lines. On cross examination, however, it became somewhat confusing as to whether Mr. Rutchik included in his claim items such as peanuts, bags, rubber bands, and other items which clearly do not come within the penumbra of PACA. This Court has reviewed the affidavit executed by Mr. Rutchik, and has taken judicial notice of the accounting prepared by the Department of Agriculture and filed as an exhibit in a related proceeding concerning Debtor.⁹ This Court is of the opinion that SF&V has not established its entitlement to the full amount claimed. As Debtor has noted, SF&V has been unable to establish with the requisite certainty that all of the produce delivered, and asserted to be subject to the trust, originated beyond the borders of Texas. Indeed, as noted above, Debtor denies even receiving approximately \$20,000 of the produce on which SF&V bases its claim. It is true that Mr. Rutchik could not positively confirm that Debtor had received this portion of the produce, and that the corresponding invoices did not bear the signature of an agent of the Debtor acknowledging receipt. On the other hand, the Department of Agriculture has indicated that this produce was received, though the basis for this conclusion is unclear. Furthermore, Debtor has listed in its schedules an obligation owed to SF&V in the amount of \$115,000, which this Court construes as an admission that at least some produce was received. There is no indication, however, as to whether the produce for which Debtor acknowledges an obligation was received before or after SF&V perfected its notice, or whether the entire amount acknowledged was even subject to the trust. Debtor apparently does not dispute that it received the remainder of the produce upon which SF&V bases its claim. Consequently, this Court is faced with the dilemma of three figures. SF&V claims, but has not proven, entitlement to \$106,000. The Department of Agriculture has, by its own reckoning, determined that this sum should be reduced to \$97,934.75. Debtor claims that either sum should be reduced by at least \$20,625.75. This Court notes the considerable volume of business transacted between Debtor and SF&V over a significant period of time, as well as the absence of any protest by Debtor, prior to this hearing, that the produce on the unsigned invoices had not been received. It is more than reasonable to assume that sometime between the end of November, when the invoices were originally submitted to Debtor for payment, and the beginning of June, when Debtor first raised this objection, it would have become apparent that Debtor had been billed for produce it had not received. The Court infers from the absence of any objection during

⁹ See *Fresh Approach, Inc. v. United States*, Adv. No. 385-3365.

this period that Debtor did not dispute receipt of that produce, and that the present objection is but another effort by counsel for Debtor to forestall the inevitable payment of SF&V's claim. SF&V's assertions may, perhaps, have been bolstered by corroborating testimony of the employee charged with delivery of the produce, or by production of loading manifests or other documentation establishing delivery, but this Court is convinced that the absence of signatures on the invoices in question is not dispositive, and more likely represents oversight or haste on the part of the employees involved, rather than a failure by SF&V to deliver the produce for which Debtor was billed. After careful consideration of the parties' pleadings, the affidavits, and the testimony of Messrs. Rutchik and Loper, this Court concludes that SF&V has failed to establish entitlement to \$8,228.89 (not subject to PACA) but that the remaining produce was delivered to and received by Debtor. This Court will therefore deduct the amount of \$8,228.89 from the original claim of \$106,163.64, and will allow as subject to the PACA trust the produce related inventory and proceeds thereof in the amount of \$97,934.75.

A PELLEGRINO & SONS, INC., PETITIONER v. U.S. DEPARTMENT OF AGRICULTURE and UNITED STATES OF AMERICA, RESPONDENTS. No. 85-1251. Decided August 21, 1985.

Before: Wald and Ginsburg, Circuit Judges

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

ORDER

Upon consideration of petitioner's Motion for Stay, the Order of the court directing respondents to show cause why the motion should not be ruled on without a response, and the responses thereto, it is

ORDERED by the court that the Order to Show Cause is discharged and respondent is granted leave to file a response. It is

FURTHER ORDERED by the court that the motion for stay is denied. Petitioner seeks to "stay" action by the Secretary of Agriculture to terminate petitioner's license to deal in perishable agriculture commodities issued pursuant to the Perishable Agriculture Commodities Act, 7 U.S.C. § 499d (1982). Following petitioner's discharge in bankruptcy, however, on August 10, 1984, and in the absence of any request for special consideration at that time, the li-

cense was automatically terminated. *See* 7 U.S.C. § 499d(a) (1982). Inasmuch as petitioner's license has already been terminated there are no proceedings currently underway which the court could stay. Furthermore, even assuming *arguendo* that it could request agency reconsideration at this time, petitioner has failed to establish an entitlement to such reconsideration.

DISCIPLINARY DECISIONS

In re: WESTERN BEST PACKING Co. PACA Docket No. 2-6720. Decided May 31, 1985.

Failure to pay promptly—Revocation of license.

Respondent failed to pay promptly agreed purchase prices for produce. Respondent's license was revoked.

*Edward M Silverstein, for complainant
Respondent, *pro se**

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.* hereinafter referred to as the "Act", instituted by a complaint filed on January 22, 1985, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period October 1983 through January 1984, respondent failed to make full payment promptly to three shippers of the net proceeds totaling \$54,736.54 realized from the sale of 42 lots of vegetables which it had received and accepted from them on consignment in interstate commerce. Further, it is alleged that, during the period August 1983 through February 1984, respondent purchased, received, and accepted, in interstate commerce, from ten sellers, 33 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of \$175,636.62.

A copy of the complaint was served upon respondent which complaint has been answered. In its answer, however, respondent admits virtually all of the material allegations of the complaint. Moreover, the respondent also admits that it has a bankruptcy proceeding pending before the United States Bankruptcy Court for the District of Massachusetts which has been designated as Case No. 84-00613L. In that proceeding, of which we take official notice, as well as here, respondent admits sufficient of the complainant's allegations to mandate the issuance of a Decision and Order against it. Therefore, upon the motion of the complainant for the issuance of an order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Western Best Packing Co., is a corporation, whose mailing address is 34 Market Street, Everett, Massachusetts 02149.
2. Pursuant to the licensing provisions of the Act, license number 821561 was issued to respondent on July 16, 1982, was renewed annually, presently is in effect, and is next subject to renewal on or before July 16, 1985.
3. As more fully set forth in paragraph 5 of the complaint, during the period October 1983 through January 1984, respondent failed to make full payment promptly, to three shippers, of the net proceeds, totaling \$54,736.54, realized from the sale of 42 lots of vegetables which it had received and accepted on consignment from them in interstate commerce.
4. As more fully set forth in paragraph 5 of the complaint, during the period August 1983 through February 1984 respondent purchased, received, and accepted in interstate commerce, from seven sellers, 29 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$141,207.22.¹

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 71 transactions set forth in Findings of Fact Nos. 3 and 4, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

¹ In the complaint, complainant has alleged that respondent owes ten sellers \$175,636.62 with respect to 38 transactions; in its answer, respondent admits owing seven sellers \$141,207.22 with respect to 29 of the 38 transactions. Because respondent's admissions are sufficient to support the conclusions reached, it is pointless to hear evidence on the four transactions in dispute.

Copies hereof shall be served upon the parties.

[This decision and order became final July 10, 1985.—Ed.]

In re: BRATEN-KOHOUT & ASSOCIATES. PACA Docket No. 2-6863. Decided August 5, 1985.

Misrepresentation of selling prices or other charges—Failure to account truly and correctly and remit to sellers—Revocation of license—Consent.

Peter Train, for complainant.

Respondent, pro se

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter referred to as the "Act"), instituted by a complaint filed on June 28, 1985 by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period November 1984 through February 1985, Respondent, acting as a broker, negotiated for 12 sellers, sale transactions involving purchases by buyers of 76 lots of fruit, all perishable agricultural commodities, in interstate commerce, totaling \$382,242.82. The complaint also alleges that Respondent, during the period December 1984 through February 1985, misrepresented either the selling prices or other charges on its accommodation invoices to the buyers, collected the resulting over-charges, and retained them for its own use in the total amount of \$2,660.00. A copy of the complaint was served upon Respondent. Respondent filed an Answer thereto admitting all the factual allegations of the complaint. Respondent and Complainant have now agreed to the entry of a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. Braten-Kohout & Associates, is a partnership consisting of two, Marvin B. Braten and James R. Kohout (hereinafter "Respondent"), whose business address is 2720 Des Plaines Avenue, Suite 26, Des Plaines, Illinois 60018.

2. Pursuant to the licensing provisions of the Act, license number 771689 was issued to Respondent on July 22, 1977. This license was renewed annually and is next scheduled for renewal on July 22, 1985.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As detailed in paragraph 6 of the Complaint and as admitted by Respondent, during the period November 1984 through February 1985, Respondent, acting as a broker, negotiated for 12 sellers, sale transactions involving purchases by buyers of 76 lots of fruit, in interstate commerce, but failed to account truly and correctly and remit to the sellers, the monies due them, in the total amount of \$382,242.82.

5. As further detailed in paragraph 7 of the complaint, and as admitted by Respondent, during the period December 1984 through February 1985, Respondent, acting as a broker, misrepresented either the selling prices or other charges on its accommodation invoices to the buyers, collected the resulting overcharges, and retained them for its own use, in the total amount of \$2,660.00.

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b) by failing to account truly and correctly and make full payment promptly, and by making false and misleading statements with respect to the transactions set forth in Findings of Fact Nos. 4 and 5 above, for which the Order below is issued.

ORDER

Respondent's license is revoked.

This order shall become effective on August 15, 1985.

Copies hereof shall be served upon the parties.

In re: CARL D. CUTTONE, d/b/a JOSEPH A. CUTTONE Co. PACA
Docket No. 2-6761. Decided August 20, 1985.

Failure to pay promptly—Revocation of license—Default.

The Judicial Officer affirmed Judge Baker's order revoking respondent's license for failure to pay promptly for produce. Failure to file an answer is an admission of the facts and constitutes a waiver of hearing and, therefore, the default decision was properly issued. Service on respondent by mailing a copy of the complaint to his last business address is adequate service, and since someone signed for the document, there was no need to mail it again by regular mail.

Dorothea A. Baker, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Administrative Law Judge Dorothea A. Baker (ALJ) filed an initial Decision and Order on June 14, 1985, revoking respondent's license for failure to pay promptly seven sellers \$215,997.03 for 17 lots of tomatoes purchased and accepted in interstate commerce during the 6-month period from March through September 1984.¹

On July 16, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).² On August 7, 1985, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on March 18, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period March through September 1984, respondent purchased, received, and accepted, in interstate and foreign commerce, from seven sell-

¹ See generally Campbell, "The Perishable Agricultural Commodities Act Regulatory program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1984 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harv. *Agricultural Law*, ch. 72 (1980 and May 1982 Supp.).

² The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

ers, 17 lots of tomatoes, a perishable agricultural commodity, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of \$215,997.03.

A copy of the complaint was served upon respondent which complaint was not timely answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Carl D. Cuttone, is an individual doing business as Joseph A. Cuttone Co., whose address is 61 South Water Market, Chicago, Illinois 60608.

2. Pursuant to the licensing provisions of the Act, license number 820069 was issued to respondent on October 20, 1981, was renewed annually, presently is in effect, and is next subject to renewal on or before October 20, 1985.

3. As more fully set forth in paragraph 5 of the complaint, during the period March through September 1984 respondent purchased, received, and accepted in interstate and foreign commerce, from seven sellers, 17 lots of tomatoes, a perishable agricultural commodity, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$215,997.03.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 17 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the rules of practice, "[f]ailure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint" (7 CFR § 1.136(c)). And the rules of practice also provide that the "failure to file an answer . . . shall constitute a waiver of hearing" (7 CFR § 1.139).

The letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised him of the effect of failing to file an answer or request oral hearing. The letter states:

In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and *three* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Accordingly, the default decision and order was properly issued in this case.

Respondent claims that he was not properly served with a copy of the complaint. But the record shows that a copy of the complaint was sent by certified mail to respondent at his last business address, and the return receipt was signed by "Joseph A. Cuttome" (respondent conducts his business in the name of "Joseph A. Cuttome Co."). That constitutes adequate service under the rules of practice. The rules of practice provide (7 CFR § 1.147(b)):

(b) *Service; proof of service.* Copies of all such documents or papers required or authorized by the rules in this part to be filed with the Hearing Clerk shall be served upon the parties by the Hearing Clerk, or by some other employee of the Department, or by a U.S. Marshal or deputy marshal. Service shall be made either (1) by delivering a copy of the document or paper to the individual to be served or to a member of the partnership to be served, or to the president, secretary, or other executive officer or any director of the corporation or association to be served, or to the attorney of record representing such individual, partnership, corporation, organization, or association; or (2) by leaving a copy of the document or paper at the principal office or place of business or residence of such individual, partnership, corporation, organization, or association, or of the attorney or agent of record and mailing by regular mail another copy to such person at such address; or (3) by registering or certifying and mailing a copy of the document or paper, addressed to such individual, partnership, corporation, organization, or association, or to the attorney

or agent of record, at the last known residence or principal office or place of business of such person: Provided, That if the registered or certified document or paper is returned undelivered because the addressee refused or failed to accept delivery, the document or paper shall be served by remailing it by regular mail. Proof of service hereunder shall be made by the certificate of the person who actually made the service: Provided, That if the service be made by mail, as outlined in paragraph (b)(3) of this section, proof of service shall be made by the return post-office receipt, in the case of registered or certified mail, or by the certificate of the person who mailed the matter by regular mail. The certificate and post-office receipt contemplated herein shall be filed with the Hearing Clerk, and made a part of the record of the proceeding.

Respondent contends that the complaint should have been served again by regular mail since respondent did not personally sign the return receipt card. But that is not what the rules of practice provide. The rules provide for serving a document by regular mail only if the certified or registered letter "is returned undelivered." The situation is the same, in this respect, as *In re Brink*, 41 Agric. Dec. 2147, 2147 (1982) (order denying reconsideration), where it was held that even though respondent was out of the country when the initial decision was served on him, the appeal time could not be extended "where service of the initial decision is accepted on respondent's behalf by someone at his place of business."

Respondent relies on *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. ____ (July 18, 1983), but in that case, the default decision was set aside because service of the complaint by registered and regular mail was returned as undeliverable. Here, there is no basis for setting aside the default decision and order. See *In re Corbett Farms, Inc.*, 43 Agric. Dec. ____ (Nov. 1, 1984); *In re Buzun*, 43 Agric. Dec. ____ (June 13, 1984); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to respondent Doss), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ____ (Jan. 4, 1984); *In re Berhow*, 42 Agric. Dec. 764 (1983); *In re Rubel*, 42 Agric. Dec. 800 (1983); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980); *In re Seal*, 39 Agric. Dec. 370, 371 (1980); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980).

For the foregoing reasons, the following order should be issued

ORDER

Respondent's license is revoked.

The facts and circumstances as set forth herein shall be published.

This order shall take effect on the 30th day after service thereof on the respondent.

In re: FOOD MARKETERS, INC. PACA Docket No. 2-6778. Decided August 20, 1985.

Failure to pay promptly—Failure to maintain the trust required by the Act—Publication of the facts—Default.

The Judicial Officer affirmed Judge Palmer's order publishing the finding that respondent committed repeated and flagrant violations of the Perishable Agricultural Commodities Act by failing to pay promptly for produce, and by failing to maintain the trust required by the Act. Failure to file an answer is deemed an admission of the allegations in the complaint and a waiver of hearing and, therefore, the default decision was properly issued. There was no need to serve the complaint on respondent's Assignee for the Benefit of Creditors. Requests for leniency by creditors are routinely ignored.

Edward M. Silverstein, for complainant.

Lawrence Cooper, Chicago, Illinois, for respondent.

Victor W. Palmer, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Administrative Law Judge Victor W. Palmer (ALJ) filed an initial Decision and Order on July 1, 1985, publishing the finding that respondent committed willful, flagrant and repeated violations of § 2 of the Act (7 U.S.C. § 499b) by failing to pay promptly six sellers \$215,252.16 for 16 lots of fruits and vegetables purchased and accepted in interstate commerce during the 2-month period from October through December 1984, and by failing to maintain the trust as required by § 5(c) of the Act (7 U.S.C. § 499e(c)).¹

On July 31, 1985, respondent, through its Assignee for the Benefit of Creditors, appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to §

¹ See generally Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1984 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harv. *Agricultural Law*, ch. 72 (1980 and May 1982 Supp.).

U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).² On August 16, 1985, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on March 22, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period October through December 1984, respondent purchased, received, and accepted, in interstate and foreign commerce, from six sellers, 16 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$215,252.16. It also was alleged that respondent failed to maintain the trust as required by section 5(c) of the Act, 7 U.S.C. § 499e(c).

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

² The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

FINDINGS OF FACT

1. Respondent, Food Marketers, Inc., is a corporation, whose address is 3534 South Kostner Avenue, Chicago, Illinois 60632.

2. Respondent is not, and has never been, licensed under the Act. It, however, carried on the business of a commission merchant, dealer, or broker, as those terms are defined in section 1 of the Act (7 U.S.C. § 499a) and was, therefore, subject to the licensing provisions of the Act at the time of the transactions alleged herein.

3. As more fully set forth in paragraph 5 of the complaint, during the period October through December 1984, respondent purchased, received, and accepted in interstate and foreign commerce, from six sellers, 16 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$215,252.16.

4. Respondent failed to maintain the trust as required by section 5(c) of the Act, 7 U.S.C. 499e(c).

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 16 transactions set forth in Finding of Fact No. 3, above, and its failure to maintain the trust as required by section 5(c) of the Act, 7 U.S.C. § 499e(c), as set forth in Finding of Fact 4, above, constitute willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the rules of practice, "[f]ailure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint" (7 CFR § 1.136(c)). And the rules of practice also provide that the "failure to file an answer . . . shall constitute a waiver of hearing" (7 CFR § 1.139).

The letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised him of the effect of failing to file an answer or request oral hearing. The letter states:

In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and *three* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each

of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Accordingly, the default decision and order was properly issued in this case.

Respondent's Assignee for the Benefit of Creditors claims that proper service of the complaint was not made since the complaint was only sent to respondent at its last business address. He claims that the complaint should also have been served on the Assignee for the Benefit of Creditors. However, the complaint was properly served. The rules of practice provide (7 CFR § 1.147(b)):

(b) *Service; proof of service.* Copies of all such documents or papers required or authorized by the rules in this part to be filed with the Hearing Clerk shall be served upon the parties by the Hearing Clerk, or by some other employee of the Department, or by a U.S. Marshal or deputy marshal. Service shall be made either (1) by delivering a copy of the document or paper to the individual to be served or to a member of the partnership to be served, or to the president, secretary, or other executive officer or any director of the corporation or association to be served, or to the attorney of record representing such individual, partnership, corporation, organization, or association; or (2) by leaving a copy of the document or paper at the principal office or place of business or residence of such individual, partnership, corporation, organization, or association, or of the attorney or agent of record and mailing by regular mail another copy to such person at such address; or (3) by registering or certifying and mailing a copy of the document or paper, addressed to such individual, partnership, corporation, organization, or association, or to the attorney or agent of record, at the last known residence or principal office or place of business of such person: Provided, That if the registered or certified document or paper is returned undelivered because the addressee refused or failed to accept delivery, the document or paper shall be served by remailing it by regular mail. Proof of service hereunder shall be made by the certificate of the person who actually made the service: Provided, That if the service be made by

mail, as outlined in paragraph (b)(3) of this section, proof of service shall be made by the return post-office receipt, in the case of registered or certified mail, or by the certificate of the person who mailed the matter by regular mail. The certificate and post-office receipt contemplated herein shall be filed with the Hearing Clerk, and made a part of the record of the proceeding.

The Assignee for the Benefit of Creditors is not a party to this proceeding, and there was no reason for serving a copy of the complaint on him. Hence, there is no basis for setting aside the default decision and order. See *In re Food Marketers, Inc.*, 44 Agric. Dec. ____ (Aug. 20, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ____ (Nov. 1, 1984); *In re Buzun*, 43 Agric. Dec. ____ (June 13, 1984); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to respondent Doss), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ____ (Jan. 4, 1984); *In re Berhow*, 42 Agric. Dec. 764 (1983); *In re Rubel*, 42 Agric. Dec. 800 (1983); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980); *In re Seal*, 39 Agric. Dec. 370, 371 (1980); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980).

In fact, we would not even have been interested in hearing the views of the Assignee for the Benefit of Creditors as an *amicus curiae*. The Judicial Officer routinely ignores requests for leniency from creditors of a violator since they have a strong motive for wanting the violator to continue in business (hoping that payments will be made), but the Department must consider the broader public interest, involving thousands of shippers and suppliers throughout the country. *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *aff'd*, 728 F.2d 347, 351 (6th Cir. 1984); *In re VPC, Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent, Food Marketers, Inc., has committed repeated and flagrant violations of § 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

The facts and circumstances set forth above shall be published. This order shall become effective on the 30th day after service on respondent.

In re: VEG-MIX, INC. PACA Docket No. 2-6612. Decided August 21, 1985.

Failure to pay promptly—Publication of the facts.

The Judicial Officer affirmed Judge Palmer's decision publishing the finding that respondent committed flagrant and repeated violations of the Perishable Agricultural Commodities Act by failing to pay promptly for produce. No hearing is required where respondent's admissions and bankruptcy pleadings show that it admittedly has failed to pay for an amount that is not *de minimis*. Since the majority of respondent's customers were located outside of Florida, this establishes the interstate nature of its business. Official notice was properly taken of documents filed in respondent's bankruptcy proceeding by respondent's secretary, for the corporation. No hearing was required to consider mitigating circumstances since excuses are routinely rejected. The fact that certain persons caused payment violations by the corporation and then skipped out, causing other innocent persons "responsibly connected" with the corporation to be adversely affected by the disciplinary order, is irrelevant.

Edward M. Silverstein, for complainant.

John Himmelberg, Washington, D.C., for respondent.

Victor W. Palmer, Administrative Law Judge

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Administrative Law Judge Victor W. Palmer (ALJ) filed an initial Decision and Order on June 26, 1985, publishing the finding that respondent committed flagrant and repeated violations of § 2 of the Act (7 U.S.C. § 499b) by failing to pay promptly six sellers over \$70,000 for 50 lots of perishable fruits and vegetables purchased and accepted in interstate commerce during the 5-month period from February through July 1983.¹

On July 31, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).² On August 16, 1985, the case was referred to the Judicial Officer for decision.

¹ See generally Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1984 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harv. *Agricultural Law*, ch. 72 (1980 and May 1982 Supp.).

² The position of Judicial Officer was established pursuant to the Act of April 4 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No 2 of 1953, 18 Fed. Reg 3219 (1953), reprinted in 5 U.S.C. app at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years

Continued

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is an administrative proceeding initiated by a complaint filed on August 3, 1984, by the Director of the Fruit and Vegetable Division, Agricultural Marketing Service. The complaint charges that respondent committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499b(4); the "PACA"), through its failure to pay 6 shippers \$191,306.60 for 50 lots of fruits and vegetables, and requests that the facts and circumstances of such violations be published pursuant to section 8 of the PACA (7 U.S.C. 499h).

Respondent filed its answer on September 24, 1984, in which it denied that, in respect to some of the sales, they were made in interstate commerce, and challenged others as accurate and being respondent's responsibility. On October 19, 1984, respondent opposed, in writing, complainant's request that a date certain be set for hearing on the basis that it had not had an opportunity to exercise its discovery rights and that a prehearing conference was needed.

On November 1, 1984, a prehearing conference was conducted by telephone, during which respondent questioned complainant's ability to establish that the transactions were in the course of interstate commerce and to obtain testimony from one of the sellers whose principals owned an interest in the respondent company. Complainant's counsel explained that its case is not dependent upon testimony from sellers, consisting wholly of respondent's own records as furnished to complainant's investigators; he also agreed to supply respondent's counsel with case citations supporting complainant's interpretation of the interstate commerce requirements. An oral hearing was thereupon scheduled for March 26-27, 1985, in the State of Florida. In preparation for the hearing, complainant agreed to furnish copies of its premarked exhibits by January 15,

appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program)

1985, and respondent was to furnish complainant copies of its pre-marked exhibits by February 8, 1985.

On January 15, 1985, complainant filed a "voluntary submission of evidence" and moved for the admission of documents marked as Exhibits 1 and 2, on the basis that they were originally provided to complainant by respondent. On January 29, 1985, respondent filed a "Response to Motion" advising that it did not object to the admission of complainant's Exhibits 1 and 2 if properly authenticated by the person who made or prepared them, or the custodian of these records at Veg-Mix; otherwise, it objected to them as unauthenticated.

On February 19, 1985, a second telephone conference was conducted during which complainant's counsel advised that he would file affidavits showing the authenticity of the exhibits and move for a decision on the pleadings. Respondent advised that it intended to resist complainant's motion for a decision on the pleadings on the basis of evidence showing that many of the debts incurred by Larry Watkins, the head of the respondent corporation who has since skipped, were for produce he had allegedly bought and sold on his own behalf even though the merchandise was billed through Veg-Mix.

On February 28, 1985, complainant filed: (1) a motion for decision; (2) affidavits by two of its investigators attesting to the authenticity of the proffered documents, identifying the names of the Veg-Mix custodians from whom they were obtained, and facts showing that respondent sold purchased produce to out-of-state customers; (3) a request that official notice be taken of pleadings in respondent's bankruptcy proceeding, designated Case No. 83-01572-HL (S.D. Fla.) with attached copies of the Debtor's Petition, statement of its liabilities, and a statement of its property; and (4) a supporting memorandum of law to which was attached (a) a listing of the transactions that form the basis of the complaint comparing them to those admitted as being owed in respondent's bankruptcy proceedings wherein it admitted owing \$13,504.05 more than alleged in the complaint; (b) a copy of the ruling in *Fava & Company*; and (c) a copy of respondent's submission of evidence in which it advised it had no documentary evidence other than documents filed in PACA Docket No. 2-6597 concerning Fairfield Sales Corporation (Transaction Nos. 38-50 in the complaint).

On March 4, 1985, respondent filed an application for the issuance of subpoenas duces tecum, with a supporting memorandum stating that it sought to test the accuracy and authenticity of the sales invoices that constitute Complainant's Exhibits 1 and 2; and to challenge whether the transactions were in interstate commerce,

whether the transactions were disputed, settled by accord and satisfaction, or whether the transactions were, in fact, made with Veg-Mix. A number of documents, including a pre-incorporation agreement between Kuzzens, Inc., and Larry Watkins, were attached to the memorandum in support of the application for the issuance of subpoenas.

On March 6, 1985, emergency eye surgery compelled me to postpone the hearing indefinitely. On March 11, 1985, respondent's counsel filed a motion requesting a 60-day extension of time to respond to complainant's motion for decision indicating that everyone's time and resources would be better served by withholding all further action in this proceeding for 60 days, during which an expedited hearing was expected to be completed in a related proceeding to determine whether Kuzzens, Inc., and two officers other than Larry Watkins should be held to be "responsibly connected" and subject to the consequences of the sanction sought by complainant. Complainant's counsel objected to the requested extension as being a dilatory attempt to avoid inevitable consequences under pertinent case law and binding authorities, and requested that respondent be required to respond to its motion for decision by March 29, 1985. On March 22, 1985, I granted respondent's motion for a 60-day extension of time, but stated:

"However, no further extensions will be granted and, it is expected that during the next 60 days, respondent will resolve all questions respecting the authenticity of the documents that complainant requests be received as part of the record."

On May 14, 1985, the Hearing Clerk sent respondent's counsel a notice that the time for filing objections to complainant's motion for a decision had expired. The Hearing Clerk based this notice upon a previous notice to respondent's counsel, sent on March 22, 1985, that the extended time for its response would end on May 11, 1985. However, respondent's counsel advised the Hearing Clerk that it believed the 60-day extension began on March 25, 1985, the date it was served with a copy of the Extension of Time and, upon her inquiry, I instructed the Hearing Clerk to so compute the extension.

On May 24, 1985, respondent filed a motion for an additional 150 day extension of time with a supporting memorandum.

Upon consideration of all of the pleadings filed to date, arguments by counsel and a review of binding precedents and authorities:

1. Respondent's motion for an additional 150 day extension of time is denied;

2. Complainant's motion for admission of its Exhibits 1 and 2 is granted.

3. Official notice is hereby taken of the pleadings in the Veg-Mix, Inc., bankruptcy proceeding, designated Case No. 83-01572-HL (S.D. Fla.) and, in particular, the following documents filed by complainant which are incorporated and made part of this record: (a) Voluntary Case: Debtor's Petition; (b) Schedule A—Statement of all Liabilities of Debtor; and (c) Schedule B—Statement of all Property of Debtor.

4. Complainant's Motion for a Decision is hereby granted; and

5. An Order is being entered this day publishing the facts of respondent's violations of the PACA which are found to be repeated and flagrant in nature.

FINDINGS OF FACT

1. Respondent, Veg-Mix, Inc., is a corporation. Respondent's mailing address is P. O. Drawer 1345, Belle Glade, Florida 33430, and its business address is 1405 North Highway 441, Belle Glade, Florida 33430.

2. Pursuant to the licensing provisions of the PACA, license number 80313 was issued to respondent on December 6, 1982. This license terminated on December 6, 1983, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual fee.

3. During the period February through July 1983, respondent purchased, received, and accepted in interstate commerce, 50 lots of perishable fruits and vegetables from 6 sellers for which it failed to make full payment promptly of the agreed purchase prices, whereby over \$70,000.00 remains unpaid.

4. On March 30, 1984, respondent filed a Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 *et seq.*) in the United States Bankruptcy Court for the Southern District of Florida, designated Case No. 83-01572-HL. In that proceeding, respondent filed various documents admitting it owed over \$200,000.00 to the 6 sellers of perishable produce referred to in finding 3, *supra*.

CONCLUSION

Respondent, by its failure to make full payment promptly to 6 sellers of agreed purchase prices for 50 lots of produce purchased, received and accepted in interstate commerce, whereby over \$70,000.00 remains unpaid, committed repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities

Act, 1930, as amended (7 U.S.C. 499b(4)); and the circumstances of such violations should be published pursuant to section 8 of the PACA (7 U.S.C. 499h).

DISCUSSION

The Judicial Officer, on December 4, 1984, entered two rulings, *Fava & Company, Inc.* (PACA Docket No. 2-6547) and *Tri-State Fruit & Vegetable, Inc.* (PACA Docket No. 2-6619), which are controlling. He ruled that a decision should be entered without hearing when the only material issue is whether a licensee under the PACA has repeatedly failed to fully and promptly pay for produce purchased, received and accepted in commerce, and the licensee has admitted it still owes an amount that is not *de minimis*.

Admissions made in pleadings filed in a contemporaneous bankruptcy proceeding are, under these rulings, to be considered as binding upon the licensee in a disciplinary proceeding pursuant to the PACA. *See also, United Fruit and Vegetable Co. Inc.*, 40 Agric. Dec. 396 (1981), *aff'd sub nom, United Fruit & Vegetable Co. Inc. v. Dir. of Fruit & Veg. Div.*, 668 F.2d 983 (8th Cir.), *cert denied*, 456 U.S. 1007 (1982).

When respondent's motion for a 60-day extension was granted on March 22, 1985, it was advised that no further extensions would be granted and that its challenge to the documents offered by complainant were expected to be resolved during those 60 days. Instead, respondent has sought an additional 150 day extension. In light of the Judicial Officer's past rulings, *supra*, respondent's admissions and thoroughly authenticated evidence, *infra*, respondent's motion for an additional extension of time to respond to the motion for decision does not appear well-founded and is therefore denied.

Complainant's motion that official notice be taken of the bankruptcy proceedings and its pleadings showing respondent has listed and admitted the debts which are the subject of the complaint, is granted as authorized by 7 CFR § 1.141(g)(6) and the cited December 4, 1984 rulings by the Judicial Officer, *supra*. *See also, Marsh Inv. Corp. v. Langford*, 490 F.Supp. 1320 (E.D. La. 1980), *aff'd*, 652 F.2d 583 (5th Cir. 1981), *cert denied sub nom; Pontchartrain State Bank v. Marsh Investment Corp., et al.*, 454 U.S. 1163 (1982); and *White v. Califano*, 437 F.Supp. 543, (D. S.D. 1977), *aff'd* 581 F.2d 697 (8th Cir. 1978).

Exhibits 1 and 2 offered by complainant are received. The exhibits are accompanied by affidavits of the two investigators specifying, under oath, the details of how they obtained these documents from respondent's employees who were their custodians. The affi-

davits authenticate and answer in full respondent's stated objection to the admission of the exhibits.

Respondent's answer admits the jurisdictional allegations of the complaint and limits its challenge to whether transactions Nos. 1-37 were in interstate commerce, and whether Nos. 38-50 were made to respondent or, alternatively, the accuracy of the terms of these sales as stated in the complaint.

Exhibit 2 consists of Veg-Mix sales invoices for February through July 1983, to customers outside the State of Florida. As explained by the investigators' affidavits, the majority of Veg-Mix's customers were located outside of the State of Florida. This establishes the interstate nature of Veg-Mix's business in general, and shows its purchases of fungible Florida-grown produce to have been made in the course of interstate commerce. 7 U.S.C. §§ 499a(3) and (8); *C & B Foods, Inc.*, 40 Agric. Dec. 961 (1981), *aff'd mem.*, 681 F.2d 804 (8d Cir.), *cert. denied*, 103 S. Ct. 70 (1982); *Benny Davila*, 36 Agric. Dec. 696 (1977); *Krueger v. Acme Fruit Co.*, 75 F.2d 67 (5th Cir. 1935); *Consolidated Citrus Co. v. Goldstein*, 214 F.Supp. 823 (E.D. Pa. 1963); *Jackson v. Harrisburg Daily Market, Inc.*, 198 F.Supp. 490 (M.D. Pa. 1961); *United States v. Klein*, 145 F.Supp. 442 (D. N.J. 1956); *W.J. Westcott Co. v. Yonk Rubin & Son*, 122 F.Supp. 888 (E.D. Pa. 1954); *United States v. Solomon*, 3 F.R.D. 411 (E.D. Ill. 1944); *James Westrick v. Ray Westrick Farms*, 42 Agric. Dec. 484 (1983); *Vic Mahns v. American Fruit Purveyors*, 34 Agric. Dec. 1950 (1975); *Troyer v. Blue Star Potato*, 27 Agric. Dec. 301 (1968); *Rand v. Shur-Gain*, 24 Agric. Dec. 499 (1965); and *Atlantic Commission Co., Inc., v. Anton Osowski and Sons*, 4 Agric. Dec. 414 (1945).

Respondent's challenge to transactions 38-50, on the basis that they were made by its principal corporate officer, Larry Watkins, for his own account and not on behalf of the corporation, is unsupportable in light of the following irrefutable facts: (1) each sale was recorded on a Veg-Mix invoice; (2) the pre-incorporation agreement filed by respondent specifies ¶9 at page 3: " * * * all of Watkins's present and future deals in Florida and elsewhere that fall within the scope of the Corporation's business purpose described . . . above shall become . . . the property of the Corporation for so long as Watkins is employed by or owns stock of the Company"; (3) respondent filed a reparation action (PACA Docket No. 2-6597) seeking \$8,045.45 from the Fairfield Sales Corporation respecting 7 of the transactions in question; and (4) in its bankruptcy pleadings, respondent admits making purchases from Fairfield Sales Corporation.

Respondent's stated challenge to the accuracy of the transactions further conflicts with its bankruptcy pleadings in which it admits

owing larger sums to the shippers than those alleged in the complaint. At any rate, even after deletion of the transactions respondent would question as to the present amounts owed, it becomes obvious it owes well over \$70,000.00, a sum sufficient for the entry of a finding that its violations of the PACA were flagrant. Furthermore, in light of the large number of transactions that were not paid within ten days' time as required by pertinent regulation (7 CFR § 46 (aa)(5)), a finding must be entered that respondent committed repeated and flagrant violations of 7 U.S.C. 499b(4). See *American Fruit Purveyors, Inc. v. U.S.*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 977 (1981); *Reese Sales Company v. Hardin*, 458 F.2d 183 (9th Cir. 1972); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967). See also, *Finer Foods Sales Co. v. Block*, 708 F.2d 774 (D.C. Cir. 1983).

Respondent's real concern is the effect the entry of the requested findings will have on corporate officers, other than Larry Watkins, who may be "responsibly connected persons" under the PACA. However, that is a matter that may not be considered in this proceeding and is not an appropriate ground for delaying further action in this proceeding. See *Baltimore Tomato Co.*, 39 Agric. Dec. 412, 415-6 (1980); *John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 718-9 (1978); and *Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633, 1643-5 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978).

Accordingly, the following Order shall be entered.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

As stated above, in view of respondent's bankruptcy admissions and Complainant's Exhibits 1 and 2, it is clear that there is no material issue of fact that warrants holding a hearing. It is not necessary to show that the undisputed facts prove all the allegations in the complaint. The same order would be issued in this case unless the proven violations were *de minimis*.³

Official notice was properly taken of the documents filed in respondent's bankruptcy proceeding by respondent's secretary, for the corporation. 7 CFR §§ 1.141(g)(6), .145(i); *In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. ____ (Aug. 21, 1985); *In re Fava & Co.*, 43 Agric. Dec. ____ (Dec. 4, 1984) (Ruling on Certified Question). Accordingly, no hearing was required since the bankruptcy documents and Complainant's Exhibits 1 and 2 show that there is no material issue of fact in the case. 7 CFR §§ 1.139, .143(b)(1); *In re A.*

³ The violations not specifically challenged in the present proceeding amount to over \$70,000.

Pellegrino & Sons, Inc., 44 Agric. Dec. ____ (Aug. 21, 1985); *In re Fava & Co.*, 43 Agric. Dec. ____ (Dec. 4, 1984) (Ruling on Certified Question).

Although respondent does not argue that a hearing should have been held so that mitigating circumstances could have been considered, it is well settled under the Perishable Agricultural Commodities Act that all excuses, including bankruptcy, are routinely rejected in determining whether payment violations occurred or whether violations were willful, since "the Act calls for payment—not excuses."⁴

⁴ *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. ____ (Aug. 31, 1983) (non-payment because another firm failed to pay respondent \$248,805.66); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 595 (1983) (non-payment because of a major customer's insolvency, the failure of other debtors to pay respondent, and increased operating costs); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2428, 2442-44 (1982) (non-payment because of bankruptcy), *aff'd*, 728 F.2d 847 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171 (1982) (non-payment because of bankruptcy), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982) (non-payment because of bankruptcy of another firm owing respondent \$776,459.23), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (non-payment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1181, 1188-40 (1981) (non-payment because respondent suddenly and unexpectedly lost a major sales account); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981) (non-payment because of financial difficulties), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982), *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 113 (1981) (non-payment because respondent lost a major sales account and a large supplier changed its course of dealing with respondent, demanding cash on delivery), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980) (non-payment because of strike and failure of others to pay respondent), *aff'd*, No. 80-3406 (6th Cir. Dec. 18, 1981), *printed in* 41 Agric. Dec. 88 (1982), *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978) (non-payment because of failure of others to pay respondent), *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976) (non-payment because of railroad strike), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467, *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 266-68 (1973) (non-payment because of financial difficulties), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974), *accord*, *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (non-payment because of financial difficulties, including difficulty in collecting from others), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981) (non-payment because respondent lost a major sales account and three large suppliers would no longer extend credit), *aff'd mem.*, 681 F.2d 804 (3d Cir. 1982), *cert. denied*, 108 S. Ct. 70 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, 1641-42 (1976) (non-payment because of financial difficulties), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978); *In re Solt*, 35 Agric. Dec. 721, 728-24 (1976) (non-payment because of bankruptcy of another firm owing respondent over \$130,000.00); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (non-payment because of financial difficulties); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (non-payment because of financial difficulties); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (non-payment because of financial difficulties).

As in the case of failure to make full payment, excuses as to why payment could not be made promptly are ignored since "the Act calls for payment—not excuses."⁵

In affirming the Judicial Officer's decision involving conclusions identical to those involved in the disciplinary proceeding here, the court held in *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983):

The petitioner argues that the Judicial Officer improperly refused to consider various "mitigating factors" that, according to it, should have been viewed as excusing its failure to pay its debts. These include the allegedly relatively small amount the petitioner owed, the absence of previous violations by the petitioner, and the lack of "devious or dishonest practices by the petitioner." In refusing to consider these factors, the Judicial Officer pointed out that "it has repeatedly been held under the Act that all excuses are routinely rejected in determining whether payment violations occurred or whether violations were willful since 'the Act calls for payment—not excuses.'" Quoting *In re Kafesak*, 39 Agric. Dec. 683, 686 (1980). See also *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982).

The Judicial Officer properly interpreted the Act. Section 2(4), 7 U.S.C. § 499b(4) (1976), is unequivocal. It makes it unlawful for a licensee to "fail or to refuse . . . to . . . make full payment promptly." As Congress noted in amending the Act in 1956, "The Perishable Agricultural Commodities Act is admittedly and intentionally a 'tough' law." S. Rep. No. 2507, 84th Cong., 2d Sess. (citing H. Rep. No. 1196, 84th Cong., 1st Sess.), reprinted in 1956 U.S. Code Cong. & Ad. News 3699, 3701. The Secretary explained the reason for this strict requirement in *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), aff'd mem. 41 Agric. Dec. 89 (D.C. Cir. No. 81-1446, Jan. 19, 1982):

⁵ *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (delayed payment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1139-40 (1981); *In re L. R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120 (1978) (delayed payment because of financial difficulties resulting from weather conditions and withdrawal from business of a brother); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 167-68 (delayed payment because of financial difficulties resulting from inexperience, overbuying and credit sales), aff'd per curiam, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 130-31 (delayed payment because of uncollectable accounts), aff'd per curiam, 524 F.2d 977 (5th Cir. 1975).

Failure to pay violations not only adversely affect the party who is not paid for produce, but such violations have a tendency to snowball. "On occasions, one licensee fails to pay another licensee who is then unable to pay a third licensee." This could have serious repercussions to producers, licensees and consumers.

Quoting In re John H. Norman & Sons Distrib. Co., 37 Agric. Dec. 705, 720 (1978).

In sum, the "goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835, 88 S. Ct. 43, 19 L.Ed.2d 96 (1967) *quoted in Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975).

The strict policy of the Secretary that all excuses for nonpayment are disregarded furthers this goal. Under the Act a licensee is required to conduct his business in a manner that insures that he pays his bills fully and promptly. If he fails to do so, he violates the Act. For this reason, alleged mitigating circumstances are irrelevant.

The reasons why all excuses are rejected in payment violation cases under the Perishable Agricultural Commodities Act, and why they are not regarded as mitigating circumstances, are set forth in *In re Esposito*, 38 Agric. Dec. 613, 632-40 (1979). In that case it is stated, *inter alia* (38 Agric. Dec. at 635-40):

Most of the cases cited by Judge Weber in support of his view that mitigating circumstances are improperly disregarded are cases involving failure to pay for produce under the Perishable Agricultural Commodities Act. It is true that under that regulatory program, excuses as to why payment was not made (usually because someone else failed to pay the violator) are disregarded in determining the sanction. But that is because of the statutory provisions and the nature and history of that particular regulatory program.

The Perishable Agricultural Commodities Act makes it unlawful to "fail or refuse truly and correctly to account and make full payment promptly" (7 U.S.C. 499b(4)). It provides for the automatic suspension of a license if a firm

fails to pay a reparation award or is discharged as a bankrupt (7 U.S.C. 499g(d), 499d(a)).⁷ [Footnote 7 states: "The Act was amended effective October 1, 1979, to authorize the Secretary to continue a license in effect after a discharge in bankruptcy (92 Stat. 2549, 2673)."]

The Perishable Agricultural Commodities Act was enacted at the request of the regulated industry. It is the only regulatory program administered by the Department paid for by the regulated industry through license fees. Payment violations are the very heart of the regulatory program. The industry desires and supports a toughminded administration of the Act which requires full payment irrespective of the reasons for non-payment.

The reason for the Department's position as to this Act was stated as follows in *In re J. H. Norman & Sons Distributing Co.*, 37 Agr Dec 705, 715-716, 719-720 (1978):

Unfortunately for Mr. Norman, he chose to engage in business in the regulated agricultural marketing system, which is probably the only field in which inability to pay one's bills is unlawful (or even dishonorable). Debtor's prisons are archaic; bankruptcy has lost its stigma; but the failure to pay for fruits and vegetables in commerce is unlawful (7 U.S.C. 499b(4)).

Special laws have been enacted relating to the agricultural marketing system because "a sound, efficient and privately operated system for distributing and marketing agricultural products is essential to a prosperous agriculture and is indispensable to the maintenance of full employment and to the welfare, prosperity, and health of the Nation" (7 U.S.C. 1621).

The failure by produce marketing firms to pay for produce would have a tendency to increase overall marketing costs which, ultimately, would be reflected in lower farm prices, higher consumer prices, or both. This would be contrary to the expressed purpose of Congress to provide for "an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids and serv-

ices, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and the price spread between the producer and consumer may be narrowed" (7 U.S.C. 1621).

The need for a severe sanction in cases of this nature was explained in *In re Sam Leo Catanzaro*, *supra*, 35 Agr. Dec. 26, 32-36 (1976), affirmed *sub nom. Catanzaro v. United States and Butz*, No. 76-1613 (C.A. 9), decided March 9, 1977 (36 Agr. Dec. 467), as follows (see, also, Tr. 19-70):

The severe sanction imposed in this case for the respondent's serious, repeated and flagrant violations of the Act is consistent with the Congressional purpose in enacting the statute. "The Perishable Agricultural Commodities Act is admittedly and intentionally a 'tough' law" (H.R. Rep. No. 1196, 84th Cong., 1st Sess., p.2). "The law has fostered an admirable degree of dependability and fairness in this industry * * *. * * * In spite of the strictness of some of the provisions of the law, the act and its administration by the Department of Agriculture have won the almost unanimous approval of this important food distributing industry and now have its virtually undivided support" (*ibid.*).⁶

In *Birkenfield v. United States*, 369 F.2d 491, 494 (C.A. 3), the Court stated:

The object of the Act is to suppress unfair and fraudulent practices in the industry. Enacted in 1930, the Act is regarded today as one of the government's most successful regulatory programs, and the

⁶ *Accord*, S. Rep. No. 2507, 84th Cong., 2d Sess. 3-4 (1956); *United States v. William B. Mandell Co.*, 242 F. Supp. 873, 875 (E.D. Pa. 1965); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 113-14 (1981), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982).

Act has received enthusiastic support from members of the regulated industry.⁷

The "goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Marvin Tragash Co. v. United States Dept. of Agr.* [524] F.2d [1255] (C.A. 5), No. 75-1481, decided December 24, 1975. The purpose of the Act was stated in *Zwick v. Freeman*, 373 F.2d 110, 116 (C.A. 2), certiorari denied, 389 U.S. 835, as follows:

The Perishable Agricultural Commodities Act is designed to protect the producers of perishable agricultural products who in many instances must send their products to a buyer or commission merchant who is thousands of miles away. It was enacted to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct. H. Rept. No. 1196, 84th Cong. 1st Sess. 2 (1955).

* * * * *

Revocation of Respondent's license, in view of his repeated and flagrant violations of the Act, is not only authorized by the Act (7 U.S.C. 499h(a)) [footnote omitted], but is also consistent with other pro-

⁷ In a Congressional report as to a 1962 amendment to the Act, it is stated (H.R. Rep. No. 1546, 87th Cong., 2d Sess 3 (1962)): "Testimony of the shippers, brokers, wholesalers, and other elements of the trade in fresh and frozen fruits and vegetables who have been operating under this act is enthusiastically and almost unanimously in its support. It has brought a high degree of stability and responsibility to an industry which had frequently been beset by instability and irresponsibility. It is regarded as one of our most successful regulatory programs." *Accord: Burkenfield v. United States*, 369 F.2d 491, 494 (8d Cir 1966); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), printed in 41 Agric. Dec. 89 (1982).

visions of the Act, which are not applicable here. . . . Similarly, if a licensee fails to pay a reparation order under the Act, his license is automatically suspended until the reparation order is paid, irrespective of whether he is unable to pay because of circumstances beyond his control (7 U.S.C. 499g(d)).

* * * * *

If a licensee is going to extend credit to its purchasers in this regulated industry, it must be adequately capitalized to be able to sustain any losses that result. If losses occur which jeopardize a licensee's ability to meet its obligations, it must immediately obtain more capital, or suffer the consequences if violations occur. In this regulated industry, the risk of loss should be taken by the banking community, whose business it is to supply risk capital, or by stockholders or other risk takers. Other licensees engaged in business in this vital agricultural marketing system should not be subjected to the risk resulting from respondent's undercapitalization or bad debt experience.

The peculiar vulnerability of producers of perishable agricultural commodities and livestock, and the importance of the Department's regulatory programs to assure payment for these commodities, were again recognized by Congress in the recent Bankruptcy Act amendments, in which it is provided (92 Stat. 2549, 2593):

§ 525. Protection against discriminatory treatment

Except as provided in Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a-499s), the Packers and Stockyards Act, 1921 (7 U.S.C. 181-229), and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943

(57 Stat. 422; 7 U.S.C. 204),⁸ a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

Congressman Foley, Chairman of the House Agricultural Committee, explained the need for the foregoing special provisions applicable to the Perishable Agricultural Commodities Act and the Packers and Stockyards Act as follows (Proceedings and Debates of the 95th Cong., 1st Sess., Vol. 19, pp. H 11761-H 11762 (October 28, 1977) [, now 123 Cong. Rec. 35671-72 (1977)]):

Under the Packers and Stockyards Act and the act of July 12, 1943, persons purchasing livestock in commerce are required to conduct their businesses in a financially responsible manner, and market agencies and dealers * * * are required to have a bond and to pay for all livestock purchased. The licenses of market agencies and dealers may be suspended if they become insolvent. Packers may be ordered to cease and desist from failing to pay for livestock and packers who become insolvent may be ordered to cease and desist from operating except under such conditions as the Secretary may impose.

⁸ This is an Act supplementing the Packers and Stockyards Act

Under the Perishable Agricultural Commodities Act, commission merchants, dealers, and brokers are required to be licensed and to account and pay promptly for all commodities purchased. Failure to pay can result in suspension of a license, and flagrant and repeated failure may result in revocation of a license. Licensees may in certain circumstances be required by the Secretary to post a bond as evidence of financial responsibility. And the Secretary may refuse to issue licenses to persons who have violated the act or have been convicted of a felony.

The Committee on Agriculture has no quarrel with the "fresh-start" philosophy underlying this bill. However, that philosophy is not new and has heretofore been one of the principal purposes of the bankruptcy laws. Because of the peculiar vulnerability of producers of perishable agricultural commodities and livestock, Congress has seen fit, notwithstanding this philosophy, to enact and from time to time amend the Perishable Agricultural Commodities Act, the Packers and Stockyards Act, and the Act of July 12, 1943.

The Committee on Agriculture conducted oversight hearings on the PACA program twice in the 94th Congress and found that the program is generally operating well and serving its purpose in protecting the producers of perishable agricultural commodities and the public. Last year, after extensive hearings, Congress enacted Public Law 94-410 which made extensive amendments to the Packers and Stockyards Act and the act of July 12, 1943, to assist the Secretary to prevent recurrence of the catastrophic losses to livestock producers which attended the bankruptcies of several large packers in the past few years. Both of these programs must be continued if this Nation is to continue to have a ready source of nutritious food at prices which are reasonable to both the producer and the consumer.

Considering all of the circumstances, there is a sound basis for the Department's position that excuses as to why

payment was not made should not be regarded as amitigating circumstance where there are serious payment violations. Although the Department's approach to enforcing the Perishable Agricultural Commodities Act appears harsh, in many cases it is not as harsh as it would seem. For example, many persons who suffer a financial loss or otherwise become in a precarious financial position continue to operate for many months and even increase their business substantially, without obtaining new capital, thereby subjecting many persons who sell produce to them to the risk of financial loss. Such conduct has repeatedly been characterized as "flagrant." See *In re John H. Norman & Son Distributing Co.*, 37 Agr Dec 705, 713 (1978); *In re Atlantic Produce Co.*, 35 Agr Dec 1631, 1640-1641 (1976), [aff'd mem.], 568 F.2d 772 (4th Cir.), cert. denied, 439 U.S. 819 (1978); *In re Sam Leo Catanzaro*, 35 Agr Dec 26, 31 (1976), affirmed *sub nom. Catanzaro v. United States and Butz*, No. 76-1618 (C.A. 9), decided March 9, 1977 (36 Agr Dec 467); *In re M. & H. Produce Co.*, 34 Agr Dec 700, 747 (1975), [aff'd mem.], 549 F.2d 830 (D.C. Cir.), cert. denied, 434 U.S. 920 (1977); *In re George Steinberg & Son*, 32 Agr Dec 236, 243-244 (1973), affirmed *sub nom. George Steinberg & Son, Inc v. Butz*, 491 F.2d 988 (C.A. 2), certiorari denied, 419 U.S. 830.

As stated in *Zwick v. Freeman*, 373 F.2d 110, 115 (C.A. 2), certiorari denied, 389 U.S. 835—

it is inconceivable that petitioners were unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of the Commodities Act. It would be hard to imagine clearer examples of "flagrant" violations of the statute than were exemplified by petitioners' conduct.

In addition, many firms which experience losses that result in their ultimate failure to pay experience such losses because they were not sufficiently cautious in extending credit. See, e.g., *In re J. H. Norman & Sons Distributing Co.*, 37 Agr Dec 705, 708-709 (1978).

But even where the failure to receive payment could not have been reasonably foreseen, and the firm immediately discontinues business (being unable to pay all of its creditors), if "a licensee is going to extend credit to its purchas-

ers in this regulated industry, it must be adequately capitalized to be able to sustain any losses that result." *In re J. H. Norman & Sons Distributing Co.*, 37 Agr Dec 705, 719 (1978).

Undoubtedly there have been some cases where the policy under the Perishable Agricultural Commodities Act has been "harsh," but "occasional hardship to the individual is a consideration outweighed by the declared policy of Congress. *Zwick v. Freeman*, *supra*, 373 F.2d at 118. See, also, *United States v. Dotterweich*, 320 U.S. 277, 284-285; *Callaghan v. Reconstruction Finance Corp.*, 297 U.S. 464, 468; *Dairymen's League Cooperative Ass'n. v. Brannan*, 173 F.2d 57, 66 (C.A. 2), certiorari denied, 338 U.S. 825; *General Ice Cream Corp. v. Benson*, 113 F. Supp. 107, 108 (N.D. N.Y.), affirmed, *per curiam*, 217 F.2d 646 (C.A. 2)." *In re George Steinberg & Son*, 32 Agr Dec 236, 248 (1973), affirmed *sub nom. George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (C.A. 2), certiorari denied, 419 U.S. 830.

The case here is, in some respects, similar to *In re Old Virginia, Inc.*, 42 Agric. Dec. 270, 272-73 (1983), in which certain persons caused payment violations by a corporation, and then skipped out, causing other innocent persons who were "responsibly connected" (7 U.S.C. § 499a(9)) with the corporation to be adversely affected by the disciplinary order issued against the corporation. But anyone who becomes responsibly connected with a firm subject to the Perishable Agricultural Commodities Act takes the risk that he or she will be adversely affected if the firm fails to pay for produce. That is an unfortunate consequence that is necessary if the remedial purposes of the Act are to be achieved.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent, Veg-Mix, Inc., has committed repeated and flagrant violations of § 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

The facts and circumstances set forth above shall be published.

This order shall become effective on the 30th day after service on respondent.

In re: A. PELLEGRINO & SONS, INC. PACA Docket No. 2-6693. Decided August 21, 1985.

Failure to pay promptly—Publication of the facts.

The Judicial Officer affirmed Judge McGrail's order publishing the finding that respondent has committed repeated and flagrant violations of the Perishable Agricultural Commodities Act by failing to pay promptly for produce. The statute of limitations applicable to reparation proceedings is not applicable here. The complaint was not defective because it fails to state the authority of the division and individual who signed it. Respondent's admissions in bankruptcy pleadings were proper subject of official notice. Since no license is revoked, it is not necessary to find willfulness. The Act does not require both a failure to pay and failure to truly and correctly account. There is no excessive conflict between PACA and the bankruptcy law.

Edward M. Silverstein, for complainant

Stephen P. McCarron, Silver Spring, Maryland, for respondent.

Edward H. McGrail, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et. seq.*), in which Administrative Law Judge Edward H. McGrail (ALJ) filed an initial Decision and Order on June 18, 1985, publishing the finding that respondent has committed repeated and flagrant violations of § 2 of the Act (7 U.S.C. § 499b) by failing to make full payment promptly to five consignors for \$77,560.55 worth of produce received on consignment in interstate commerce during the period from August through November, 1983, and failing to pay 17 sellers promptly for \$640,313.50 worth of produce purchased and accepted in interstate commerce during the same period.*

On July 22, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On August 15, 1985, the case was referred to the Judicial Officer for decision.

* See generally Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1984 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harv. *Agricultural Law*, ch. 72 (1980 and May 1982 Supp.).

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer, and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. 499a *et seq.*), hereinafter referred to as the "Act", instituted by a complaint filed on November 21, 1984, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period August through November 1983, respondent received and accepted, on consignment, in interstate commerce 32 lots of fruits and vegetables, all being perishable agricultural commodities, from five consignors but failed to make full payment promptly to the five consignors of the net proceeds, or balances thereof, received from the sale of this produce in the total amount of \$77,560.65, and that during the same period, August through November, 1983, respondent purchased, received, and accepted, in interstate commerce, from 17 sellers, 88 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$640,313.50.

A copy of the complaint was served upon respondent, which filed an answer thereto in which it generally denied the material allegations in the complaint, admitted the allegations in the complaint regarding its bankruptcy filing, and stated several affirmative defenses.¹ On February 8, 1985, complainant filed a "Motion for a Decision", together with a "Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision." The motion

¹ Respondent claims that the bringing of the complaint is barred by the statute of limitation of section 6(a) of the Act (7 U.S.C 449f(a)); however, such a claim is without merit. *Melvin Beene Produce v Agricultural Marketing Serv.*, 728 F.2d 347 (6th Cir. 1984). Respondent, also, claimed that the complaint was defective because it failed "to state the authority of the division and the individual who signed the complaint to bring" it. This claim is also without merit, *Marvin Tragash Co. v. United States Dept. of Agr.*, 524 F.2d 1255 (5th Cir. 1975), as is respondent's claim that the complaint improperly failed to allege that it failed to "truly and correctly account," *The Zeiter Food Corp.*, 36 Agric. Dec. 1430 (1977) and that it paid its debts to the satisfaction of its creditors *Marvin Tragash Co v. United States Dept. of Agric.*, *supra*, 524 F.2d 1255.

was generally based upon respondent's admission of its bankruptcy proceeding. On the same date complainant also filed a "Request to Take Official Notice" of respondent's bankruptcy proceeding, Case No. 83-01572-HL (D. MA). On February 27, 1985, respondent filed its opposition to complainant's Motion, and Request, together with a memorandum of points and authorities. Based on the submissions of the parties, complainant's Motion for a Decision, and Request to Take Official Notice, are granted.

A review of respondent's bankruptcy Schedule A-3 reflects that it admits virtually all of the allegations in the complaint. Of the 21 shippers named in the complaint, all are listed as creditors by the respondent, and none of their claims are disputed by it. In fact, respondent admits owing at least two other produce shippers over \$6,000 ²; admits owing 17 of the 21 shippers named in the complaint the exact amounts alleged as being owed to them by the complainant ³; admits owing only two of the shippers less than the amount alleged in the complaint ⁴; and admits owing the remaining two shippers \$15,217.05 more than alleged in the complaint ⁵. Totally, respondent admits owing the 21 shippers \$14,379.55 more than was alleged in the complaint. It is therefore concluded that respondent's admissions in its bankruptcy pleadings establish the accuracy of the allegations of indebtedness in the complaint. See *United Fruit and Vegetable Co., Inc.*, 40 Agric. Dec. 396 (1981), *aff'd sub. nom.*, *United Fruit and Veg. Co., Inc. v. Div. of Fruit & Veg.*, 668 F.2d 983 (8th Cir.), cert. denied, 456 U.S. 1007 (1982); and *Fava and Company, Inc.*, 43 Agric. Dec. ____ (PACA Docket No. 2-6547, December 4, 1984) (Ruling on Certified Question). In view of these conclusions the following Decision and Order is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, A. Pellegrino & Sons, Inc., is a corporation, whose address is 110-112 New England Produce Center, Chelsea, Massachusetts 02150.

2. Pursuant to the licensing provisions of the Act, license number 771016 was issued to respondent on March 30, 1977. This license was renewed annually, but automatically terminated on August 10,

² Annicelli Fruit & Produce, New Haven, Conn. (\$5,125), and J. Parker Produce, Inc., Sunbury, NC (\$954.39).

³ Transaction Nos. 1-9, 33-35, 56-106, and 116-120

⁴ Transaction Nos. 107-111 (50 cents less); and Nos. 112-115 (\$837 less).

⁵ Transaction Nos. 10-32 (\$4,043.30 more); and Nos. 36-55 (\$11,173.75 more).

1984, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent's Plan of Arrangement was approved by the United States Bankruptcy Court for the District of Massachusetts.

3. As more fully set forth in paragraph 5 of the complaint, during the period August through November 1983, respondent received and accepted, on consignment, in interstate commerce, 32 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly to the five consignors the net proceeds received from the sale thereof in the total amount of \$77,560.55.

4. As more fully set forth in paragraph 6 of the complaint, during the period August through November 1983, respondent purchased, received, and accepted in interstate commerce, from 17 sellers, 88 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$640,813.50.

CONCLUSIONS

Respondent's failures to make full payment promptly with respect to the 120 transactions set forth in Findings of Fact Nos. 3 and 4, above, constitute repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued. Respondent's violations are also willful. *George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.), cert. denied, 419 U.S. 830 (1974). However, as no license is sought to be revoked, it is not necessary to make a finding that respondent's violations were willful. See *Fava & Company, Inc.*, 48 Agric. Dec. ____ (PACA Docket No. 2-6547, December 4, 1984) (Ruling on Certified Question).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's argument that the Act requires both a failure to pay promptly and a failure to truly and correctly account is without merit (*Marvin Tragash Co. v. USDA*, 524 F.2d 1255, 1258 (5th Cir. 1975); *In re Zeiter Food Corp.*, 36 A.D. 1430, 1436 (1977)), as is respondent's related argument that bad faith is required. *In re John H. Norman & Sons Distributing Co.*, 37 Agric. Dec. 705, 715 (1978); and see *Marvin Tragash Co. v. USDA*, 524 F.2d 1255, 1257 (5th Cir. 1975) (It is the "goal [of the Perishable Agricultural Commodities Act] that only financially responsible persons should be engaged in the perishable agricultural commodities industry"); *accord, Finer Foods Sales Co. v. Block*, 708 F.2d 774, 782 (D.C. Cir. 1983); *Chidsey v. Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971); *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), cert. denied, 389 U.S. 835 (1967).

Where, as here, respondent's failure to pay results from bankruptcy, there is no unconscionable or excessive conflict between the Department's position under the Perishable Agricultural Commodities Act and the bankruptcy law.⁶

Resopndent's violations were clearly repeated and flagrant. *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972); *Zwick v. Freeman*, 373 F.2d 110, 115, (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 610 n. 6 (3d Cir. 1960); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1169-70 (1982), *aff'd* 708 F.2d 774 (D.C. Cir. 1983).

Official notice was properly taken of the documents filed in respondent's bankruptcy proceeding. 7 CFR §§ 1.141(g)(6), 1.145(i); *In re Fava & Co.*, 43 Agric. Dec. ____ (Dec. 4, 1984) (Ruling on Certified Question). Accordingly, no hearing was required since the bankruptcy documents show that there is not material issue of fact in the case. 7 CFR §§ 1.139, .143(b)(1); *In re Fava & Co.*, 43 Agric. Dec. ____ (Dec. 4, 1984) (Ruling on Certified Question).

For the foregoing reasons, the following order should be issued.

ORDER

Respondent, A. Pellegrino & Sons, Inc., has committed repeated and flagrant violations of § 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

The facts and circumstances set forth above shall be published.

This order shall become effective on the 30th day after service on respondent.

⁶ *Zwick v. Freeman*, 373 F.2d 110, 115-17 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2438-40 (1982), *aff'd*, 728 F.2d 347, 351 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1176-72 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961, 969 (1981), *aff'd mem.*, 681 F.2d 804 (3d Cir. 1982), *cert. denied*, 103 S Ct 70 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 115 (1981), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1908-13 (1974), *aff'd*, 524 F.2d 1255, 1256-58 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 255-59 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

In re: REEVES PRODUCE INC. PACA Docket No. 2-6213. Decided August 26, 1985.

Failure to pay—Licensing pertains whether actually a dealer—**Publication of the facts.**

The Judicial officer affirmed Judge Baker's decision publishing the finding that respondent has committed repeated and flagrant violations of § 2 of the Perishable Agricultural Commodities Act by failing to pay promptly for produce. The requirement that an informal complaint be filed is a "useless," but required, "technicality." Anyone licensed as a dealer is subject to the disciplinary provisions of the Act while licensed irrespective of whether he is actually a dealer. Where a corporation assumes the liabilities of a person previously operating as an individual, and fails to pay for the individual's transactions, the corporation has violated the Act. Complainant's cross appeal contending that additional violations should have been found is denied since the ALJ's findings are supported by evidence which she found credible, based on her observation of the witness. This case was properly treated as "no pay" rather than "slow-pay" in view of the *Gilardi* decision.

Dennis Becker, for complainant.

James G. Wolterman, Covington, Kentucky, for respondent.

Dorothea A. Baker, Administrative Law Judge

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Administrative Law Judge Dorothea A. Baker (ALJ) filed an initial Decision and Order on December 19, 1984, publishing the finding that respondent has committed repeated and flagrant violations of § 2 of the Act (7 U.S.C. § 499b) by failing to pay four sellers promptly \$96,881.51 for 56 lots of produce purchased and accepted in interstate commerce during the period from January 1981 through June 1982.*

On January 16, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** Complainant filed a response and cross-appeal on Febru-

* See generally Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1984 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Hart, *Agricultural Law*, ch. 72 (1980 and May 1982 Supp.).

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1958, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation, 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer).

ary 11, 1985. On February 28, 1985, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, with a few trivial changes. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*); hereinafter sometimes referred to as the "PACA"), the Regulations promulgated pursuant to the PACA (7 CFR 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 CFR 1.130 through 1.151); hereinafter sometimes referred to as the "Rules of Practice"). The proceeding was instituted by a Complaint filed on February 8, 1983, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the Complaint that Reeves Produce, Inc. (hereinafter sometimes referred to as "Respondent") violated section 2 of the PACA (7 U.S.C. 499b) by failing to make full payment promptly for 121 lots of perishable agricultural commodities purchased from seven sellers in interstate and foreign commerce, in the amount of \$130,098.82. The Complaint sought revocation of Respondent's (Reeves Produce, Inc.) PACA license. Respondent filed an Answer on March 15, 1983, in which it denied violating the PACA.

An oral hearing was held on February 29, 1984, before Administrative Law Judge Dorothea A. Baker in Cincinnati, Ohio. Complainant was represented by Andrew Y. Stanton, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, D.C., 20250. Respondent was represented by James G. Woltermann, Esquire, 421 Garrard Street, Covington, Kentucky, 41012. At the close of the oral hearing, Complainant changed its requested sanction to a finding of flagrant and repeated violations of the PACA and publication of such findings. The last brief herein was filed July 10, 1984.

PERTINENT STATUTORY PROVISIONS

7 U.S.C., Section 499(a):

cer, and 8 years as administrator of the Packers and Stockyards Act regulatory program)

When used in this chapter:

(6) The term "dealer" means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce, except that (A) no producer shall be considered as a "dealer" in respect to sales of any such commodity of his own raising; (B) no person buying any such commodity solely for sale at retail shall be considered as a "dealer" until the invoice cost of his purchases of perishable agricultural commodities in any calendar year are in excess of \$200,000; and (C) no person buying any commodity other than potatoes for canning and/or processing within the State where grown shall be considered a "dealer" whether or not the canned or processed product is to be shipped in interstate or foreign commerce, unless such product is frozen or packed in ice, or consists of cherries in brine, within the meaning of paragraph (4) of this section. Any person not considered as a "dealer" under clauses (A), (B) and (C) may elect to secure a license under the provisions of Section 499(c) of this title, and in such case and while the license is in effect such person shall be considered as a "dealer".

7 U.S.C. Section 499(b):

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

* * * * *

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction;

7 U.S.C Section 499(f):

(b) Any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers or brokers in such State or Territory and any employee of the United States Department of Agriculture or any interested person may file, in accordance with rules and regulations of the Secretary, a complaint of any violation of any provision of this chapter by any commission merchant, dealer or broker and may request an investigation of such complaint by the Secretary.

(c) If there appear to be, in the opinion of the Secretary, any reasonable grounds for investigating any complaint made under this section, the Secretary shall investigate such complaint and may, if in his opinion the facts warrant such action, have said complaint served by registered mail or by certified mail or otherwise on the person concerned and afford such person an opportunity for a hearing thereon before a duly authorized examiner of the Secretary in any place in which the said person is engaged in business: Provided, that in complaints wherein the amount claimed as damages does not exceed the sum of \$3,000, a hearing need not be held and proof in support of the complaint and in support of respondent's answer may be supplied in the form of depositions or verified statements of fact.***

Section 8(a) (7 U.S.C. § 499(h)):

(a) Whenever (a) the Secretary determines as provided in section 6 that any commission merchant, dealer, or broker has violated any of the provisions of section 2, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal Court of having violated section 14(b) of this Act, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period of not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

*** Effective December 22, 1981, the Act was amended by substituting "\$15,000" for "\$3,000" (95 Stat 1213, 1269-70, 1358 (1981))

PERTINENT REGULATIONS (7 CFR Part 46)

Section 46.2 Definitions:

(x) "Wholesale or jobbing quantities" as used in paragraph (6) of the first section of the act, means aggregate quantities of all types of produce totalling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received.

Section 46.2 (aa):

"Full payment promptly" is the term used in the [PACA] in specifying the period of time for making payment without committing a violation of the [PACA]. "Full payment promptly," for the purpose of determining violations of the [PACA], means:

* * * * *

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted.

* * * * *

FINDINGS OF FACT

1. Respondent is a Kentucky corporation with an address of Route 18, Florence, Kentucky, 41042.
2. Pursuant to the licensing provisions of PACA, License No. 810746 was issued to Respondent on March 23, 1981. This license was renewed annually and terminated on March 23, 1983, due to Respondent's failure to pay the required annual license fee.
3. Prior to the incorporation of Reeves Produce, Inc., Mr. Gregory A. Reeves did business as a sole proprietor under the name of Reeves Produce Company, 135 Burlington Pike, Florence, Kentucky, and operated a retail and wholesale produce business.
4. Respondent became incorporated on January 9, 1981, at which time it began engaging in business subject to license under the PACA by purchasing 80 lots of produce in interstate and foreign commerce from the Castellini Company, Cincinnati, Ohio, in amounts over a ton in any one day or undertook the obligation to pay for such produce purchased by its president, Greg Reeves, prior to its incorporation.
5. During the period January, 1981, through June, 1982, Respondent, or its President, whose obligations Respondent legally adopted, purchased, received and accepted, *in addition to the amounts set forth below which the Respondent acknowledges to*

owing, 30 lots of perishable agricultural commodities from the Castellini Company, Cincinnati, Ohio, in interstate and foreign commerce, but failed to make full payment promptly of the agreed purchase prices, which after credits and allowances total the sum of \$88,001.26.

6. With respect to the amounts alleged to be owed and unpaid as set forth in paragraph 5 of the Complaint, Respondent does not dispute that it owes the following amounts:

Benny Mandell Produce, Inc , Transactions 31-56 \$5,986.00
M, Degaro Company, Inc., Transactions 57-65... 2,628.75
Sansone Palmisano Company, Transactions 119-121... <u>265.50</u>
	<u>\$8,880.25</u>

7. In an August 12, 1982, decision by the Boone Circuit Court resulting from a Kentucky State Court lawsuit instituted by one Castellini, from whom produce purchases were made, against Greg Reeves and Respondent, a Master Commissioner's Report and Recommended Order, adopted by Judge Sam Neace of the Boone Circuit Court on August 31, 1982, concluded that there was an indebtedness of \$99,798.26, subject to an offset, resulting in a total indebtedness of \$88,001.26, due and owing Castellini from both Greg Reeves and Respondent for purchases of produce. It stated as follows:

That both Reeves, personally and his successor corporation, Reeves Produce, Inc., are liable for the total debt due to plaintiff. Where the facts clearly show, as in this case, a corporation assumption, without interruption, of the total operations of a pre-existing unincorporated business, and both businesses are larged (sic) owned, operated and managed by the same individual, the successor corporation must be regarded as having absorbed its predecessor and assumed its liabilities in taking over its assets. *Kentucky Beaver Collieries v. Mellon and Smith*, 254 S.W. 421 (Ky., 1923).

Further, Reeves' testimony as to the total assumption of his business operations by his corporation provides ample evidence to permit the Master Commissioner to find that said corporation assumed the liabilities of Reeves' sole-pro-

prietorship. *Ward v. Knox Gas and Production Company*, 332 S.W. 2d 487 (Ky. 1959).

8. Both party litigants introduced evidence as to who was liable, Reeves Produce, Inc., or, Datco, Inc., for the purchase of 65 lots of produce in interstate and foreign commerce from three sellers in the amount of \$33,216.82. An evaluation of the evidence of record gives credence to the Respondent's position that Reeves Produce, Inc. transferred its wholesale business to Datco, Inc. of Cincinnati, Ohio, on March 13, 1982, following which Gregory A. Reeves began purchasing produce on behalf of Datco, Inc., while Reeves Produce, Inc. continued in the retail produce business in Florence, Boone County, Kentucky.

Mr. Reeves' testimony and explanation as to why the corporation should not be liable for produce purchased on or after March 13, 1982, was that:

"We closed down the wholesale, and we, at that time—I say 'we' * * * we decided to what you might say *merge, or transfer our wholesale business* * * *" (emphasis added) Tr. 92

9. Contrary to Respondent's contentions, the record shows clearly that Respondent violated the PACA, as 1) Respondent admittedly failed to pay \$8,880.25 to three sellers for the purchase of 26 lots of produce in interstate and foreign commerce, 2) Respondent failed to pay for purchases from Castellini of 30 lots of produce in interstate and foreign commerce in the amount of \$88,001.26, or is legally obligated for such past due and unpaid purchases made prior to its incorporation by its president, Greg Reeves, 3) Respondent's violations were flagrant and repeated, and 4) Respondent was either licensed under the PACA or operating subject to license during the time pertinent thereto and is subject to the jurisdiction of the Secretary of Agriculture.

10. With respect to the remaining transactions, involving Datco, Inc., and Datillo, the Complainant has not borne its burden of proof, and except for the transactions involving Castellini and the admissions of Respondent, no failure to pay on the part of the Respondent corporation is found.

CONCLUSIONS

Respondent has raised no meritorious jurisdictional arguments which would deny jurisdiction of the Secretary of Agriculture to this proceeding.

It has not been established that jurisdiction should be denied under the Act by virtue of the Complainant's alleged failure to follow the procedural requirements of 7 U.S.C. Section 499(f). Nor has it been shown that jurisdiction should be denied under the Act because Reeves Produce, Inc. allegedly is neither a broker, commission merchant or dealer within the meaning of the Act.

The above mentioned contentions of lack of jurisdiction are not sustainable. The Respondent has not shown that the procedures for instituting the subject Complaint have not been followed, or that it was not subject to the PACA as a dealer. See pages 5, 6, and 7 of Complainant's Reply Brief filed July 10, 1984.

The admissions of the Respondent herein are sufficient to invoke the sanctions sought by Complainant. Respondent admits it owes amounts totalling \$8,870.25 for produce represented in transactions 31 through 65, and 119 through 121 of the Complaint. Under the published case law of the Department of Agriculture, this admitted liability to three sellers involving 38 purchases in interstate and foreign commerce constitutes flagrant and repeated violations of the PACA.

With respect to the contested transactions (1-30), Respondent denies making the thirty alleged purchases from the Castellini Company, Cincinnati, Ohio, claiming they were made by Mr. Reeves as an individual. For reasons more fully set forth by Complainant on brief, the preponderance of the evidence clearly shows that at least 28 of the 30 purchases, here involved, were made by Respondent after January 9, 1981, the date of its incorporation. There is some doubt as to whether transactions 5 and 11 occurred in December, 1980 and well as January, 1981. There is no doubt but that Mr. Reeves in his individual unincorporated capacity or, in his corporate capacity owed the Castellini Company for the produce. The better law is that set forth by the Boone Circuit Court, Kentucky: The corporation assumed, without interruption, the total operations of the pre-existing unincorporated entity and both businesses were largely owned, operated and managed by the same individual, Mr. Reeves. Under these circumstances, Respondent should not be permitted to escape liability for violating the PACA due to any purchases that may have been made by Mr. Reeves, allegedly acting as an individual. Inasmuch as he was in a position to know when the corporation would be formed he was in a position to anticipate the needs thereof.

Moreover, the investigator testified that the people at Castellini were referring to the corporation, whether or not "Greg Reeves" was placed on the copies of the sales ticket.

In addition, the procedure of operating as agent for a to be organized corporation was not unknown to Mr. Reeves. By his own testimony he did it after March 13, 1982 (Tr. 93-95) as well as the use of a similar name to utilize credit (Tr. 99).

The liability of Respondent to Castellini would be valid even if the corporation did not get into a "start up" position until February 1, 1981, as contended by Respondent.

The next group of contested purchases (transactions 68-85, 86-90, 116-118) are said to reflect purchases by a corporation called Datco, Inc., formed by Mr. Reeves and others on March 13, 1982, when Respondent split its business into a retail market and a wholesale operation. Also, as concerns purchases from Phil Datillo (transaction 91-115 of the Complaint) Respondent admits such purchases but maintains that these invoices were paid as part of a liquidation.

Because the Government has the burden of proof herein and because Complainant has not introduced substantive persuasive evidence, other than "self-interest" on the part of Respondent as to controvert or rebut Respondent's evidence, I do not believe the record as a whole supports Complainant's contention that Respondent corporation was liable for non-payment of the contested purchases in transactions 66-85, 86-90, 116-118 and 91-115. The record is not clear as to why Mr. Reeves was not joined as an individual Respondent herein.

Careful consideration has been given the arguments and contentions of Respondent, including the variance between the acceptance and billing dates of Castellini, and the inferences one might draw therefrom; and whether the presence of "employees" is determinative of when a corporation first commences business activity; as well as the matter of where produce was delivered. The place of delivery of produce is not in and of itself determinative of who is responsible for the payment thereof.

This is a disciplinary proceeding brought pursuant to section 8 of the PACA (7 U.S.C. 499h). The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. S2168 (May 29, 1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers and brokers. H.R. Rep. 1041, 71st Cong., 2d Sess. (1930) Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities.¹

¹ It has also been held that Congress intended by enactment of the PACA, to establish bars to preclude all but financially responsible persons from engaging in the

Continued

Chidsey v. Guerin, 443 F.2d 584 (6th Cir. 1971); *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976). "Accordingly, certain conduct by commission merchants, dealers, or brokers [was] declared to be unlawful. 7 U.S.C. Section 499b". Id. at 858. Enforcement is effectuated through a system of licensing with penalties for violation. H. Rep. 1041, 71st Cong., 2d Sess. (1930) 3. See also *George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.), *Cert. den.*, 419 U.S. 830 (1974).

The instant proceeding is an enforcement action of the kind to which reference is made above. The record herein does establish that Respondent did violate section 2(a) of the PACA (7 U.S.C. 499[a]).

As sanction for Respondent's flagrant and repeated violations of the PACA, Complainant initially sought revocation of Respondent's license, but at the hearing changed its request to a finding of flagrant and repeated violations of the PACA and publication of such findings, in light of the termination of Respondent's license on March 23, 1983. This is an appropriate sanction when a licensee or one subject to license has committed flagrant and repeated violations of PACA, as here, and has not made payment of his obligations as of the time of the hearing. *In re Bananas, Inc.*, 43 Agric. Dec. 588, 590-606 (1983).

Respondent's failures to make timely payment, as alleged in the Complaint, are clearly in violation of the prohibitions of section 2 of the PACA (7 U.S.C. 499b). *Atlantic Produce*, 35 Agric. Dec. 1631 (1976), *aff'd mem.* 568 F.2d 772 (4th Cir.), *cert. den.* 439 U.S. 819 (1978). Moreover, the numerous violations committed by Respondent constitute flagrant and repeated violations of the PACA. *American Fruit Purveyors v. United States*, 630 F.2d 370, 373-374 (5th Cir. 1980); *G. Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd sub. nom.*, *George Steinberg and Son, Inc. v. Butz, supra*, 491 F.2d 988.²

businesses subject to the PACA. *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. den.*, 389 U.S. 835 (1967); *Marvin Tragash Co. v. United States Dept. of Agr.*, 524 F.2d 1255, 1257 (5th Cir. 1975).

² See, also *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) *cert. den.* 389 U.S. 835 (1967); *Reese Sales Company v. Hardin*, 458 F.2d 188 (1972); *Atlantic Produce, supra*, 35 Agric. Dec. 1631; *JH Norman & Sons Distributing Co.*, 37 Agric. Dec. 705, 709 (1978).

Respondent's violations are *malum prohibitum*—not *malum in se*. Accordingly, there is no inconsistency between the finding that [respondent] conducted himself responsibly and honorably, and the finding that respondent's failure to pay over \$48,000 for produce in 73 transactions and \$200 in brokerage fees in 20 transactions constitutes repeated, flagrant and willful violations of the Act.

All contentions, motions and requests of the parties have been carefully considered, and to the extent not ruled upon and which are inconsistent with this decision, they are denied.

I believe the record as a whole supports the sanction sought by the Complainant and the Order herein is issued accordingly.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The ALJ properly held, based on the record in this case, that the investigation was preceded by the filing of an informal complaint by the Chief of the PACA Branch. The requirement that an informal complaint be filed has been recognized as a "useless," but required, "technicality." As stated in *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1190-91 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983):

¶ Accordingly, there is no basis in the Act or rules of practice for respondent's argument that an *informal* (or reparation) complaint must be filed as a condition precedent to the issuance of a formal disciplinary complaint.

¶ However, the Secretary's right to inspect the accounts, records, and memoranda of commission merchants, dealers, and brokers is limited (insofar as relevant here) to "the investigation of complaints" (7 U.S.C. § 499m(a)), and, therefore, except for the Paris Foods reparations complaint, respondent or the trustees could have refused the Department access to respondent's accounts, records, and memoranda until one of the Department's employees filed an informal complaint. However, as stated by Judge Liebert, this matter was waived.

¶ Moreover, the requirement of a complaint preceding an investigation is not a safeguard to licensees except insofar as it precludes "fishing expeditions," where there is no basis for suspecting a violation. Where, as here, there was reason to believe that respondent may have committed violations, it was a useless (but, nonetheless, required) technicality for a Department employee, or someone else, to file a complaint before the secretary had the right to inspect respondent's accounts, records and memoranda. However, there would be no basis in the Act or in reason to prejudice the final outcome of this case because of that failure, even if there had not been a waiver as to this matter, or a complaint filed by Paris Foods.

¶ Furthermore, where a complaint is filed by one person, as in this case, the Secretary may extend the inquiry to in-

clude other similar violations. *See Mandell, Spector, Rudolph Co. v. United States*, 364 F.2d 889, 891 (8d Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967).

¶ As requested in respondent's appeal, page 2, official notice is taken of a Department form providing for an informal complaint by the Director of the Fruit and Vegetable Division. But, as shown above, there is no requirement in the Act or rules of practice requiring the use of such a form as a condition precedent to the filing of a formal complaint and, therefore, the failure to use it here is of no consequence.

¶ If it were to be held by a reviewing court that an informal complaint (or a reparation complaint) must be filed before a formal disciplinary complaint is issued, that there was no waiver here, and that the Paris Foods violation and reparation complaint are insufficient to support the procedure and final order here, the Department could (and I believe should) start this proceeding anew, by filing an informal complaint, conducting a 15-minute investigation (by telephoning the three injured parties to be sure that respondent's debts have not been fully paid), issuing a new formal disciplinary complaint, and holding a new hearing (incorporating by reference the present hearing record). There is no statute of limitations in the Act or rules of practice relating to repeated and flagrant violations. *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1642 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978). And the failure to file an informal complaint in the circumstances here did not violate any constitutional or fundamental rights of respondent so as to "taint" the evidence previously obtained relating to the 28 violations not involving Paris Foods.

Similarly, the ALJ properly held that respondent was a dealer subject to the Act. Respondent was licensed as a dealer from March 23, 1981, to March 23, 1983, and anyone licensed as a dealer is subject to the disciplinary provisions of the Act for violations occurring while licensed. 7 U.S.C. § 499a(6). The narrow reading of 7 U.S.C. § 499a(6) contended for by respondent would defeat the remedial purposes of the Act. Furthermore, the evidence shows that respondent bought in jobbing quantities (which made it a "dealer") in at least some of the transactions involved here.

In addition, the evidence supports the ALJ's findings that respondent was responsible for the violations in transactions 1-30 in-

volving the Castellini Company. Even if some of the purchases were originally made by Mr. Reeves as an individual, when he incorporated, and his corporation assumed without interruption the total operations of his pre-existing, unincorporated business, his corporation assumed the liabilities of his individual business. The corporation was, therefore, the dealer required by the Act to "truly and correctly . . . account and make full payment promptly . . . to the person [Castellini] with whom such transaction [was] had" (7 U.S.C. § 499b(4)).

Here, again, respondent's narrow reading of the Act, contending that even if the respondent corporation became liable for the Castellini transactions, it would not violate the Act for the respondent corporation to fail to pay Castellini because Castellini was not the "person with whom such transaction [was] had," would defeat the remedial purposes of the Act. Where a corporation assumes the liabilities of a person previously operating as an individual, and fails to pay someone for the individual's produce transactions, the corporation has failed to pay "to the person with whom such transaction [was] had," within the meaning of the Act.

Furthermore, the same order would have been issued in this case if only the admitted violations were proven.

Complainant's cross-appeal contends that the ALJ should have found additional violations. But the ALJ's findings in this respect are accepted since they are supported by evidence which she found credible, based on her observation of the witness as he testified. This is not a case where the ALJ's credibility determination should be overturned.

Respondent contends that only a suspension order should have been issued in this case because it should have been treated as a "slow-pay" case rather than a "no-pay" case. However, the ALJ issued the appropriate order for the violations found here. *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. ____ (June 27, 1984), attached as an appendix to this decision. Respondent's attorney admits that Gilardi was mailed to him on February 21, 1984, which gave respondent 30 days after receipt within which to make full payment.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent, Reeves Produce, Inc., has committed repeated and flagrant violations of § 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

The facts and circumstances set forth above shall be published.

This order shall become effective on the 30th day after service on respondent.

In re: HANI NAEMI d/b/a GREEN ACRES PRODUCE Co. PACA Docket No. 2-6733. Decided July 19, 1985.

Failure to pay promptly—Revocation of license—Default.

*Andrew Stanton, for complainant
Respondent, pro se*

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on February 5, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period June 1983 through September 1984, respondent purchased, received, and accepted, in interstate and foreign commerce, from eight sellers, 110 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$110,254.79.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Hani Naemi, is a individual doing business as Green Acres Produce Co., whose address is 5881 West Fort Street, Detroit, Michigan 48209.

2. Pursuant to the licensing provisions of the Act, license number 130868 was issued to respondent on April 21, 1983. This license was newed annually, but was automatically suspended on October 28, 84, pursuant to Section 7(d) of the Act (7 U.S.C. 499g(d)), when respondent failed to satisfy a reparation award in the amount of \$8,616.45. See *Surefine Central Corporation v. Hani Maemi d/b/a Green Acres Produce Co.*, 43 Agric. Dec. ____ (1984).

3. As more fully set forth in paragraph 5 of the complaint, during the period June 1983 through September 1984, respondent purchased, received, and accepted in interstate and foreign commerce, from eight sellers, 110 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$110,254.79.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 110 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

Respondent's license is revoked.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This decision and order became final August 31, 1985—Ed.]

REPARATION DECISIONS

CAL-MEX DISTRIBUTORS INC. v. MIKE PHILLIPS ENTERPRISES, PACA
Docket No. 2-6589. Decided July 1, 1985.

Contract term—Substitution of produce—Reparation awarded.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$961.02 in connection with the shipment in interstate commerce of 252 wirebound crates of cucumbers.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and respondent filed an answering statement. Complainant did not file a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Cal-Mex Distributors, Inc., is a corporation whose address is P.O. Box 1717, Chula Vista, California.

2. Respondent, Mike Phillips Enterprises, Inc., is a corporation whose address 301 South 3rd Street, Phoenix, Arizona. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about July 21, 1983, complainant agreed to sell to respondent 648 cartons of 36 to 42 count cucumbers for shipment from Chula Vista, California, to respondent in Phoenix, Arizona.

4. On July 23, 1983, complainant shipped from loading point in Chula Vista, California, to respondent in Phoenix, Arizona, 168 car-

tons of 36 to 42 count cucumbers and 252 wirebound crates of cucumbers.

5. The cucumbers arrived at that place of business of respondent's customer in Phoenix, Arizona, on July 25, 1983. On that date, at 10:30 a.m., a federal inspection was made of the 252 wirebound crates of cucumbers after they had been unloaded and stacked on pallets at the place of business of respondent's customer. The inspection noted that product temperature in various crates was 54° and 55°F. Quality was stated to be: "Clean, mostly fairly well, some well formed and generally well colored. Grade defects ranged from 8-20%, average 13%, mostly misshapen." The condition of the cucumbers was stated to be as follows:

Generally fresh and firm. Average 1% damage by shriveling. From 2 to 6%, average 4% damage by yellowing. Decay in most samples 2 to 14%, some none, average 5% various types decay, mostly Black Rot in various stages, mostly advanced.

6. Respondent's customer rejected the cucumbers and respondent took possession of them. Respondent reworked enough of the wirebound crates of cucumbers to produce 195 cartons of cucumbers which it sold for \$4.50 per carton, or a gross amount of \$877.50. Respondent dumped 20 crates of cucumbers which left 144 crates which respondent described as "poor" and as "#2 cucumbers". These 144 crates were also eventually dumped. Respondent claimed the following expenses in connection with the cucumbers:

Pickup charges, 252 at \$.25, or \$63.00
Delivery charges, 195 at \$.25, or \$48.75
MPE printed boxes, 195 at \$.80, or \$156.00
Rework labor, 195 at \$1.40, or \$273.00
A 12% over head charge on \$540.70, or \$64.89
Federal inspection Associated Grocers, \$37.05
Federal Inspection MPE prior to dumping, \$38.08
Freight deducted by Associated Grocers \$126.00
Net returns reported by respondent were \$70.78.

7. The informal complaint was filed on February 2, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant maintained in the formal complaint that the 252 wirebound crates of cucumbers were sold to respondent at an

agreed price of \$6.35 per crate, or a total of \$1,600.20, f.o.b.¹ Respondent vigorously denied this contention and stated instead that it purchased from complainant 648 cartons of cucumbers, and was not aware that the 252 wirebound crates had been substituted for 480 cartons until it was so notified by its customer, Associated Grocers of Phoenix, Arizona, on July 25, 1983. In reply, complainant made the following admission:

The original order was for the 648 cartons of 6 to 7 cucumbers, but complainant could only fill 168 cartons of 6 to 7 size. Complainant therefore called Respondent at his office on July 23, 1983 to advise him of this situation and to find out if he wanted us to substitute the equivalent of 252 W/B crates which would equal the original order. Respondent was not at his office, so Complainant then called his home . . . and talked with his daughter. Respondent was not at home, but she advised me that her father was in need of the cucumbers and to send them with the truck that was loading.

Respondent's president, Paul J. Phillips, replied that his daughter did not live at his home and had no recollection concerning a discussion with anyone from complainant's firm about wirebound crates of cucumbers. Whether or not such a conversation ever took place, it is evident that complainant has not shown that the daughter of one of respondent's officers, speaking from such officer's home, had any authority to enter into any type of business negotiations on behalf of her father's corporation. See *Fowler Packing Co. v. Associated Grocers Co. of St. Louis*, 36 Agric. Dec. 87 (1977). We conclude that there was no contract between the parties relative to the 252 wirebound crates. Respondent claimed in its answer that complainant breached the contract by shipping only 168 cartons of cucumbers, and by substituting the 252 wirebound crates for the remaining 480 cartons. We agree. However, respondent did not claim or prove any damages resulting from this breach.

Respondent took possession of the 252 wirebound crates of cucumbers, and is liable to complainant for the reasonable value thereof on *quantum meruit* basis. *Black & White Veg. Co. v. Hale Bros.*, 33 Agric. Dec. 1833 (1974). Unfortunately, respondent's method of dealing with the 252 wirebound crates of cucumbers leaves much to be desired. Respondent states that approximately

¹ Complainant seeks to recover only \$961.02, based on a proposed settlement figure suggested by an official of the Fruit and Vegetable Division of this Department during the informal stages of this proceeding.

40% of the 252 wirebound crates were used to produce 195 cartons of cucumbers which it sold for \$4.50 per carton, or a gross of \$877.50. After deducting the expenses enumerated in Finding of Fact 6 respondent reported a net return of \$70.73. It is not clear from the record whether respondent reworked the entire lot of 252 wirebound crates of cucumbers, or simply enough to produce the 195 cartons. Respondent did report losing 20 wirebound crates during the repacking process, and states the balance of 144 wirebound crates was "poor grade product". In another place respondent refers to the remaining crates as "# 2 cucumbers". It seems that from the outset respondent felt no responsibility to dispose of the remaining crates of cucumbers, even though it had taken possession of the entire lot of 252 crates when it reconditioned at least enough to produce the 195 cartons. Respondent sent complainant the following message on an undated "Brokers memorandum of Sale":

The 252 w/b crates of cucumbers you shipped that were not ordered, and rejected by Associated Grocers, were pickup by Mike Phillips Enterprises after the federal inspection was held at Associated Grocers. We reconditioned the 252 w/b crates of cucumbers. Making 195 ctn. of 6 to 7 top cucumbers that was sold to Associated Grocers to try to fill their order.

There are 148 w/b crates of #2 cucumbers left that belong to Cal-Mex Distributors. What do you want done with them?

There is no indication in the record that complainant received this message in time to give any instructions relative to the remaining crates of cucumbers. Apparently, such cucumbers were dumped. Under the circumstances we do not think it is proper to use any of the figures reported by respondent in assigning a value to the 252 wirebound crates of cucumbers.

The federal inspection of the 252 wirebound crates of cucumbers shows a total of 10% average condition defects, including 1% damage by shriveling, 4% damage by yellowing, and 5% damage by decay. Although the temperatures noted on the inspection are somewhat high, we believe that, had these cucumbers been sold on an f.o.b. basis, they would not be considered to have made good delivery on arrival. The closest market to Phoenix, Arizona, with quotations for wirebound crates of cucumbers is Los Angeles, California. The Los Angeles Wholesale Market Report for July 25, 1988, shows the following quotations for wirebound crates of cucumbers: "med 8.50-9.50 lge 7.50 mxd szs 4-5.00 fair qual 2-3.50". Considering the

condition of the cucumbers on arrival we believe the lowest quotation, or \$2.00, represents their reasonable market value. The record shows that freight in the amount of \$.50 per crate was incurred in the shipment of these cucumbers from Los Angeles to Phoenix. This amount should also be allowed. See UCC section 2-728(2). Accordingly, we find that the total value of the cucumbers was \$630.00. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$630.00, with interest thereon at the rate of 13% per annum from August 1, 1983, until paid.

Copies of this order shall be served upon the parties.

L. & E. FARMS v. EMERSON ELLIOTT. PACA Docket No. 2-6636. Decided July 1, 1985.

Transportation services and conditions—Suitable shipping condition—Reparation awarded.

George S. Whitten, Presiding Officer.
LeRoy W. Gudgeon, Northfield, Illinois, for complainant.
Respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$7,848.00 in connection with the shipment in interstate commerce of a truckload of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Depart-

ment's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. After receiving two extensions of time, complainant filed an opening statement within the time allowed. Respondent did not file an answering statement. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant is a partnership composed of Jack Esformes Corp. and Long Farms, Inc., doing business as L. & E. Farms, whose address is Westover, Maryland.

2. Respondent, Emerson Elliott, is an individual doing business as Emerson Elliott Produce, whose address is P.O. Box 745, Casselberry, Florida. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about July 26, 1983, complainant sold to respondent, one truckload of U.S. No. 3 Grade mature green tomatoes as follows: 1152-25 pound cartons of size 5×6 at \$5.50; and 288-25 pound cartons of size 6×6 at \$4.50 per carton; plus 15 cents per carton for palletizing, for a total price of \$7,848.00, f.o.b. shipping point. It was agreed that the tomatoes would be shipped in a truck secured by respondent, and be delivered to Baltimore, Maryland for overseas transit, to San Juan, Puerto Rico.

4. On July 27, 1983, complainant shipped the tomatoes from loading point in Westover, Maryland, to respondent's customer in San Juan, Puerto Rico. The truck was delivered to the port facility in Baltimore, Maryland on July 28, at 8:30 am. At that time officials of Puerto Rico Marine Management, Inc., the firm responsible for ocean shipment, ascertained that the refrigeration unit on the van was set at 54 degrees, while the air temperature in the van was reading 71 degrees, and the tomatoes had a pulp temperature of 68 degrees. Officials of Puerto Rico Marine Management, Inc., telephoned Mr. Emerson Elliott at 8:35 a.m. on July 28, 1983, and advised him of the temperatures. Mr. Elliott directed that the van be accepted and shipped to Puerto Rico. Due to certain operating difficulties at the shipping docks in Baltimore, Puerto Rico Marine Management, Inc., caused the van to be transferred to the port facilities at Elizabeth, New Jersey, and it was shipped from such port on July 29, 1983, to Puerto Rico. The van arrived at San Juan, Puerto Rico on August 1, 1983, and respondent's customer in San Juan was advised that the van was available for pickup on that day. However, respondent's customer did not pick up the van until August 5, 1983.

5. Prior to shipment, between the hours of 8:30 a.m. and 6:30 p.m. on July 27, 1983, the tomatoes were federally inspected at

complainant's place of business in Westover, Maryland, and were stated to be mature green, and to grade U.S. No. 3 with no decay. After the van was picked up by respondent's customer in San Juan, Puerto Rico, on August 5, 1983, the tomatoes were subjected to federal inspection at 1:00 p.m. on that date while still on the van. Such inspection noted that the cartons were generally wet and leaking juice from decayed tomatoes. Condition of pack was noted as "Slack, filled to 1 to 3 inches from top." Temperatures were stated to be 62°F for the top layer and 64°F for the bottom layer. Quality and condition were stated to be as follows:

Quality: Mature, cleam (sic), generally reasonable (sic) well to well shaped (sic), slight rough to Smooth. Grade defects affecting US No. 2 grade ranges (5×6 lot), 14 to 32%, average 17%. (6×6 lots), from 28 to 36%, average 32%, mostly misshapen, scars, cat faces.

Condition: 5×6 lot: Average Approximately 80% light red and red. From 12 to 32%, average 20% decay. 6×6 lot: Average Approximately 25% turning and pink, 55% light red and red. Decay ranges 16 to 24% average 20%. Each lot decay being Watery Soft Rot and Bacterial Soft Rot in advanced stages.

The inspection certificate stated that each lot failed to grade U.S. No. 2 on account of grade defects.

6. On August 12, 1983, respondent's customer secured a dump certificate covering 921 cartons of the tomatoes.
7. An informal complaint was filed on February 21, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Respondent contends that the tomatoes were sold as U.S. No. 2. Complainant has maintained throughout this proceeding that the tomatoes were sold as U.S. No. 3 grade. On the basis of all the evidence in the record, we conclude that complainant has sustained its burden of proving that the tomatoes were sold as U.S. No. 3. See *Best Pak Potato Co., Inc. v. Louis M. Palomo Wholesale Produce*, 32 Agric. Dec. 675 (1978).

Respondent asserts that complainant is responsible for the high temperatures of the tomatoes as noted by the ocean carrier upon arrival of the tomatoes at the docks in Baltimore, Maryland. However, it is evident that the refrigeration unit on the trailer was set at 54°, although the actual air and pulp temperatures were considerably higher. Any transportation problem, unless it can be shown

to have been caused by the shipper, is the responsibility of the buyer in a f.o.b. sale. *R. F. Taplett Fruit & Cold Storage Co. v. Joseph Northwest*, 19 Agric. Dec. 411 (1960). In addition, respondent was notified by the ocean carrier of the information with regard to temperatures when the van arrived at the docks in Baltimore. Respondent at this point instructed the ocean carrier to accept and ship the van to Puerto Rico.

The evidence shows that the van arrived in Puerto Rico on August 1, 1983, and that at that time respondent's customer was given notice of the arrival, and informed that the van was available on that date for pickup. However, respondent's customer did not pick up the van until August 5, 1983. The federal inspection made at 1:00 p.m. on that date is too remote in time from the time of the arrival of the van to be of probative value in showing the condition of the tomatoes at the time of arrival. See *Pan-American Fruit Company v. Halem Hazzouri*, 25 Agric. Dec. 681 (1966) and *Peter Condakes Co. v. Michael Bros. Inc.*, 19 Agric. Dec. 650 (1960). Even if the inspection had been made in a timely fashion, and had at that time shown an abnormal amount of decay, there would still be the problem of abnormal transportation. In order for the suitable shipping condition warranty (See 7 CFR § 46.43(i) & (j)) to apply, a buyer who has accepted a commodity must prove that transportation services and conditions were normal. See *The Grower-Shipper Potato Co. v. Southwestern Pro. Co.*, 28 Agric. Dec. 511 (1969). In this case respondent himself alleged that the carrying temperatures should have been in the 54 degree range, but were instead considerably above that range.

We conclude that since respondent accepted the tomatoes, and has not proved a breach of contract on the part of the complainant, respondent is liable to complainant for the full purchase price of the tomatoes, or \$7,848.00. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$7,848.00 with interest thereon at the rate of 18% per annum from September 1, 1983, until paid.

Copies of this order shall be served upon the parties.

KITAHARA FARMS, INC. *v.* UNION FRUIT COMPANY. PACA Docket No. 2-6664. Decided July 1, 1985.

Suitable shipping condition—F.O.B. sale—Reparation awarded.

George S. Whitten, Presiding Officer.

Matthew McInerney, Newport Beach, California, for complainant Respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$10,324.33 in connection with the shipment in interstate commerce of a vanload of nectarines and plums.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement. Respondent filed an answering statement, and complainant did not file a statement in reply. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Kitahara Farms, Inc., is a corporation whose address is P.O. Box 546, Reedley, California.
2. Respondent, Union Fruit Company, is a corporation whose address is 21st and Smallman Street, Pittsburgh, Pennsylvania. At the time of the transaction involved herein, respondent was licensed under the Act.
3. On or about June 3, 1983, complainant sold to respondent one truckload of mixed fruit as follows:

511 nectarines, Aurelio Grand, size 100s at \$6, or	\$3,066
396 nectarines, Mayfair, size 90s at \$10, or	\$3,960
99 nectarines, Mayfair, size 100s at \$6, or	\$594
82 plums, Durado, size $3 \times 4 \times 4$ at \$12, or	\$984
930 plums, Durado, size 4×4 at \$10, or	\$8,900
232 plums, Durado, size $3 \times 4 \times 5$ at \$9, or	\$2,088
198 plums, Red Beau, size 4×5 at \$8, or	\$1,584
	<hr/>
Total	\$15,576
Temperature recorder	\$22.50
Precool and palletize at 70 or	<u>\$1,298.60</u>
	<hr/>
Total	\$16,892.10

The terms of the contract were f.o.b., Reedley, California with destination respondent's place of business in Pittsburgh, Pennsylvania.

4. The plums and nectarines were shipped by complainant to respondent on June 3, 1983, by truck.

5. On June 9, 1983, the load of plums and nectarines arrived at respondent's place of business in Pittsburgh, Pennsylvania, and were unloaded by respondent. At 8:30 a.m., on June 9, 1983, 544 cartons of the total of 644 cartons of Durado plums, all of the Red Beau plums, and 800 cartons of the total 1,006 cartons of nectarines were federally inspected while stacked on pallets at respondent's place of business. Such inspection disclosed temperatures in various locations of 48°F. to 46°F. and condition was stated to be as follows:

Durado Plums: Mostly hard, many firm to firm ripe. Reddish purple to deep purple color. Less than 1% decay. Red Beau Plums: Mostly firm to firm ripe, some hard, few ripe. Light red to deep red color. Less than 1% decay. May Fair Nectarines: Generally hard to firm, few firm ripe. Ground color mostly turning yellow to yellow, some light green. Average 2% damage bv bruising. 1% decay Aurelio

Grand Nectarines: Generally hard, few firm. Ground color mostly turning yellow to yellow, some light green. Less than 1% decay.

6. Respondent began sales of the plums and nectarines, and on June 15, 1983, at 9:35 a.m., a portion of the plums and nectarines were again federally inspected. Such inspection covered, according to the applicant's statement, 323 cartons of Mayfair nectarines, 358 cartons of Aurelio nectarines, and 372 cartons of plums. The temperature was stated to be 40°F. in various locations. Condition was stated to be as follows:

May Fair Nectarines: Mostly firm to firm ripe, many ripe. Ground color turning yellow to yellow. Decay: from 6 to 62%, average 46%.

Aurelio Grand Nectarines: Mostly firm to firm ripe, some ripe, some hard. Ground color generally turning yellow to yellow, few light green. Decay: from 4 to 48%, average 15%. In each lot decay is Brown Rot and Blue Mold Rot in various stages, mostly advanced.

Plums: Mostly firm to firm ripe, some ripe. From 12 to 70%, average 30% soft. Reddish purple to deep purple color. Average 1% decay.

An additional federal inspection on June 21, 1983, at 8:05 a.m., covering 48 cartons of Mayfair nectarines showed temperatures in various locations from 38 to 42°F, and decay from 94 to 100%, average 97% Blue Mold Rot and Gray Mold Rot in advanced stages. A fourth federal inspection on June 27, 1983, at 7:00 a.m. covering 249 cartons of Mayfair and Aurelio nectarines showed temperatures in various locations of 40°F. with "practically all fruit decayed, Gray Mold Rot and Brown Rot, advanced stages."

7. Respondent resold the plums and nectarines from June 9 through June 24, 1983, and remitted net proceeds to complainant in the amount of \$6,567.77.

8. An informal complaint was filed on December 28, 1983, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant brings this action to recover the balance of the purchase price of the load of nectarines and plums accepted by respondent. Respondent admits that the plums and nectarines were shown by the federal inspection to be in acceptable condition on arrival. However, respondent maintains that two or three days after

unloading the fruit began to break down rapidly. Respondent attributes this breakdown to some inherent problem in the fruit.

The warranty of suitable shipping condition, applicable in f.o.b. sales, requires delivery without abnormal deterioration *at the contract destination*, if the shipment is handled under normal transportation service and conditions. See 7 CFR § 46.43(j). The warranty is an extension of the common law warranty of merchantability which, in an f.o.b. sale, is applicable only at shipping point. See *Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980). The federal inspection on June 9, 1983, showed that the plums and nectarines made good delivery on arrival. The federal inspection on June 15, some six days after arrival, is too remote in time to establish a breach of the warranty of merchantability applicable at shipping point. This is especially true in light of the fact that a temperature recorder was included with this load of produce, but was not submitted into evidence by respondent. See *Louis Caric & Sons v. Ben Gatz Co.*, 38 Agric. Dec. 1486 (1979). We also note that although the recommended transit temperature for both plums and nectarines is 31 to 32°F, the federal inspection of June 9, 1983, showed that temperatures were 43° to 46°F in various locations. The subsequent inspection of June 15, 1983, showed that the temperature had only been brought down to 40°F. We find on the basis of all of the evidence that respondent has failed to prove a breach of contract on the part of complainant.

Since respondent accepted the plums and nectarines, and has failed to prove a breach of contract respondent is liable to complainant for the full purchase price thereof, less the \$6,567.77 already paid, or a balance of \$10,324.33. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$10,324.33, with interest thereon at the rate of 13% per annum from July 1, 1983, until paid.

Copies of this order shall be served upon the parties.

AGRI-NATIONAL SALES CO., INC. *v.* ANTHONY D'ACQUISTO, d/b/a TROPIC BANANA CO. PACA Docket No. 2-6666. Decided July 1, 1985.

Consignment—Failure to pay—Reparation awarded.

George S. Whitten, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$1,060.00 in connection with the shipment in interstate commerce of three truck-loads of bananas.

A copy of the report of investigation made by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the verified pleadings of the parties are considered part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Agri-National Sales Co., Inc., is a corporation, whose address is Suite 120, 3320 East Shea Boulevard, Phoenix, Arizona.
2. Respondent, Anthony D'Acquisto, is an individual doing business as Tropic Banana Company, whose address is 300 North Van Buren, Milwaukee, Wisconsin. At the time of the transactions involved herein respondent was licensed under the Act.
3. On or about September 18, 1983, complainant shipped from loading point in the State of Pennsylvania, to respondent in Milwaukee, Wisconsin, one truckload, consisting of 970 boxes of bananas, on a consignment basis. After arrival of the bananas the parties agreed that respondent should pay \$.50 per box, or \$485.00,

plus \$.75 per box, or \$727.50 for handling and loading, and \$950.00 for freight, or a total of \$2,162.50 for the bananas.

4. On or about September 18, 1983, complainant shipped from loading point in the State of Pennsylvania, to respondent in Milwaukee, Wisconsin, two truckloads of bananas, each containing 1,000 boxes, on an f.o.b. basis. Following arrival and acceptance of the two truckloads of bananas the parties agreed that respondent would pay for one truckload on a basis of \$2.50 per box or \$2,500.00, plus \$.75 per box, or \$750.00 for handling and loading, and \$950.00 for freight, or a total of \$4,200.00. The parties agreed that respondent would pay for the second truckload on the basis of \$.50 per box, or \$500.00, plus \$.75 per box, or \$750.00, for handling and loading, and \$950.00 for freight, or a total of \$2,200.00.

5. Respondent has paid complainant \$7,502.50 with respect to the three transactions set forth in paragraphs 3 and 4, above.

6. An informal complaint was filed on April 27, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant alleged, both in the documentation attached to the formal complaint, and in documentation that was made a part of the report of investigation, that respondent agreed, after arrival of the three truckloads of bananas, to the prices set forth in the Findings of Fact, totaling \$8,562.50.

Respondent admits in his answer that the first load was on a consignment basis, and claims to have remitted \$2.50 per box to complainant. However, complainant is only claiming \$.50 per box as being due, by agreement after arrival of the bananas, on the first load. Even if the handling and loading charge, plus freight, is included with the \$.50 per box charge, the total complainant claims to be due on this load would be \$2.23 per carton. Respondent also stated, as to the first load, "there were 185 ripe boxes of bananas throughout the load and five cases completely speckled that were dumped. Also the color of the bananas looked like they were chilled." Respondent submitted no evidence to support these contentions.

As to the second load of bananas respondent states that there was an understanding "that it would be \$2.50 f.o.b. or less with protection on an open bill." Respondent made complaints about the quality of the fruit on this load, but did not deny complainant's claim that the parties agreed to payment on a \$2.50 per carton basis after arrival of the second load. We conclude that the total agreed price on this load was \$4,200.00.

As to the third load respondent states that "it was shipped the same way." Respondent alleges that this fruit also arrived with quality problems. Respondent states that he decided to have a government inspection of the third load, and that such inspection was made on the day following arrival. Respondent also asserts that a report of the inspection is attached as Exhibit 1 to the answer. Exhibit 1 to the answer is indeed a copy of a federal inspection covering a load of bananas, but such inspection was made on September 7, 1983, prior to shipment of any of the loads involved in this proceeding. We conclude that respondent has failed to show any breach of contract as to this load.

The total that we have found to be due pursuant to the agreements between the parties for all three loads of bananas is \$8,562.50. The record shows that respondent has paid complainant a total of only \$7,502.50, leaving a balance of still due and owing of \$1,060.00. Respondent has presented us with no adequate defense which would show why respondent is not liable to complainant for this amount. We conclude that respondent's failure to pay complainant the sum of \$1,060.00 is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$1,060.00 with interest thereon at the rate of 13% per annum from October 1, 1983, until paid.

Copies of this order shall be served upon the parties.

MARTINOUS FOODS *v.* KEITH CONNELL, INC. PACA Docket No. 2-6687. Decided July 2, 1985.

Lie detector tests not admissible—Damages based on market price.

In a contract where there is no writing, respondent prevails based on a preponderance of the evidence. Complainant's effort to submit results of polygraph test denied. Damages are based on difference between market price and contract price.

George S. Whitten, Presiding Officer.

Complainant, *pro se*.

Edward J. Houlehan, Kansas City, Missouri, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$3,750.00 in connection with the sale of 500 hundred weight of potatoes in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant is an individual, Mose Martinous doing business as Martinous Foods, whose address is 1914 Perkins, Joplin, Missouri.

2. Respondent, Keith Connell, Inc., is a corporation whose address is 400 East Red Bridge Road, Suite 317, Kansas City, Missouri. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about January 3, 1984, in contemplation of movement in interstate commerce, respondent contracted to sell to complainant 500 100 pound sacks of U.S. No. 1 Burbank Russett potatoes, 10 ounce and larger, at \$10.50 per hundredweight delivered. The potatoes were to be shipped from the State of Colorado to complainant in Joplin, Missouri.

4. Shipment of the potatoes was delayed for approximately 3 days, and on each day respondent called complainant and informed complainant that shipment could not be made because of the un-

availability of transportation. On or about January 10, 1984, respondent notified complainant that respondent was ready to ship a truckload of 10 ounce stripper potatoes. Complainant informed respondent at that time that the contract called for the shipment of U.S. No. 1, 10 ounce Burbank Russet Potatoes. Complainant informed respondent that, unless respondent shipped U.S. No. 1, 10 ounce and larger, Burbank Russet Potatoes, complainant would buy against the contract.

5. On January 20, 1984, complainant purchased 850 50 pound sacks of 10 ounce minimum Wisconsin potatoes at \$18.00 per hundredweight as a cover purchase.

6. The formal complaint was filed on May 22, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant brings this action to recover damages for respondent's alleged failure to ship potatoes. Complainant claims that respondent agreed to sell 500 100 pound sacks of U.S. No. 1, Burbank Russet Potatoes, 10 ounce and larger, at a price of \$10.50 per hundred weight delivered. Respondent alleges that the contract instead called for the sale of 10 ounce stripper potatoes at \$10.50 per hundredweight delivered.

The contract between the parties was admittedly oral, with neither party sending any confirmatory memoranda. Both parties submitted extensive affidavit testimony to support their positions. It is not necessary that we discuss in detail the affidavits submitted by the parties. However, complainant submitted one item of evidence, which was objected to by respondent, and which we think deserves comment. This was a report to complainant from Personnel Research, Inc. of Springfield, Missouri, dated September 27, 1984, which states that Mose Martinous had taken a polygraph examination which showed that he was telling the truth in regard to the purchase of the subject potatoes. Respondent has asked that this report be excluded from evidence. We agree that the report should be excluded. In a leading federal case on the admissibility of polygraph tests the United States Court of Appeals for the 8th Circuit summarized the status of such tests as evidence in the following manner:

In applying the scientific acceptability standard to polygraph tests, all United States Courts of Appeals addressing the issue have excluded the results of unstipulated polygraph tests. These courts reasoned that the polygraph does not command scientific acceptability and that it is not gen-

erally believed to be scientifically reliable in ascertaining truth and deception to justify its utilization in the trial process. Consequently, they have held that the results of an unstipulated polygraph examination are either *per se* inadmissible or that the trial court did not abuse its discretion in refusing admission of the test results. . . .

The court went on to state that:

In 1964, the Committee on Government Operations of the House of Representatives conducted several days of hearings on the use of polygraphs by the federal government. During the course of the hearings, the Committee heard testimony from preeminent polygraphist, psychiatrists, psychologist, psychophysiologists and other witnesses who were able to attest to the operation and accuracy of polygraphs. In its report, the Committee concluded:

There is no "lie detector". The polygraph machine is not a "lie detector", nor does the operator who interprets the graphs detect "lies". The machine records physical responses which may or may not be connected with an emotional reaction and that reaction may or may not be related to guilt or innocence. Many, many physical and psychological factors make it possible for an individual to "beat" the polygraph without detection by the machine or its operator.

The court further quoted the committee as stating that "people have been deceived by a myth that a metal box in the hands of an investigator can detect truth or falsehood." *United States v. Alexander*, 526 F.2d 161 (8th Cir. 1975). Another circuit dealing with the same issue pointed out that tests performed at the request of a examinee without advance notice to the government, "are particularly unreliable since the examinee knows that if he 'fails' the test his counsel will not submit the results to the government, and therefore is under less stress". *United States v. Feldman*, 711 F.2d 758 (7th Cir. 1983). In accordance with these decisions we have given no credence or consideration to the polygraph test report submitted by complainant.

The evidence submitted by the parties in this proceeding presents us with a very close question of fact. After careful analysis and consideration of all of the evidence we have concluded that respondent did contract to sell to complainant 500 100 pound sacks of

Burbank Russet Variety, U.S. No. 1, 10 ounce and larger potatoes at \$10.50 per hundred pounds delivered.

Complainant has claimed damages on the basis of the price at which it purchased similar potatoes from Wisconsin. We have consulted Market News Reports for the closest market (Chicago, Ill.) with quotations for similar potatoes from Colorado, and find that such potatoes were selling in the range of 21 to 23 dollars per hundred-weight. Accordingly, we find that complainant's request for damages on the basis \$18.00 per hundredweight is reasonable. The difference between the contract price of \$10.50 per hundredweight for the 500 hundredweight of potatoes and the \$18.00 price totals \$3,750.00. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$3,750.00, with interest thereon at the rate 13 percent per annum from February 1, 1984, until paid.

Copies of this order shall be served upon the parties.

DEL MONTE BANANA COMPANY *v.* CARL MOORE, INC. PACA Docket No. 2-6660. Decided July 2, 1985.

Breach of contract—F.O.B. sale—Rejection—Reparation.

Dennis Becker, Presiding Officer.

James Lee, Mobile, Alabama, for complainant.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$2,534.53 in connection with a shipment of bananas in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. The amount claimed in the formal complaint does not exceed \$15,000.00. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of

Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure the verified pleadings of the parties are considered a part of the evidence in this case, as is the Department's report of investigation. The parties were given the opportunity to file additional evidence in the form of verified statements. Neither party did so. Although given an opportunity to do so neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Del Monte Banana Company, is a corporation with an address at P.O. Box 011940, Miami, Florida.
2. Respondent, Carl Moore, Inc., is a corporation with an address at 756 Scott Street, Memphis, Tennessee. At the time of the transaction in issue in this proceeding respondent was licensed under the Act.
3. On December 27, 1983, complainant sold to respondent 877 boxes of bananas at \$6.00 per box for a total price of \$5,262.00 plus \$.37 per box for handling and \$.37 per box for fuel charge for a total additional cost of \$648.98, and a total contract price of \$5,910.98, f.o.b. The bananas were shipped in interstate commerce from Mobile, Alabama, to Memphis, Tennessee on December 28 1983, and arrived at respondent's place of business on December 30 1983.
4. Respondent rejected the bananas because it did not like the stage of ripeness, which it described as being stage number 3. The bananas remained on the truck trailer from December 30, 1983 until January 3, 1984, when they were inspected by the Federal Inspection Service. That inspection showed in pertinent part that "Most fruit light green, breaking slightly toward yellow, some yellowish green, some green. No decay."
5. Because respondent had rejected the bananas complainant sold them to Proffer Produce, Esther, Missouri, for \$3.85 per box, for a total contract price of \$3,876.45.
6. Respondent has not paid the difference between the original contract price and the price paid by Proffer Produce, which difference is \$2,534.53.
7. A formal complaint was filed in this matter on July 5, 1984, which was within nine months of the time the cause of action herein accrued.

DISCUSSION

This proceeding involves a dispute in which complainant claims it sold bananas to respondent which met contract specifications, and respondent claims the bananas which were shipped it by complainant did not meet contract specifications, as a result of which it

rejected the load. As the proponent of a breach of contract complainant has the burden of proof to show that such was the case. See *New York Trade Association v. Sidney Sandler*, 32 Agric. Dec. 702 (1973). Based upon our analysis of the evidence we find that complainant has sustained its burden of proof.

There is no dispute between the parties that respondent ordered a truckload of bananas from complainant on or about December 27, 1983. Although respondent says it ordered more than the 877 boxes of bananas which were delivered to it on December 30, 1983, the difference in volume is immaterial insofar as this proceeding is concerned. The evidence shows that complainant shipped to respondent on December 28, 1983, 877 boxes of bananas, which shipment arrived at respondent's place of business on December 30, 1983. The transportation time of two days is one day longer than that which is normal from Mobile, Alabama to Memphis, Tennessee. However, since respondent did not controvert complainant's claim that the transaction was f.o.b., the evidence is clear that respondent took possession of the goods at shipping point, as a result of which respondent is responsible for any delays in transportation. The evidence also shows that when the bananas arrived at respondent's place of business on December 30, 1983, respondent was not happy with the coloration of the bananas. Respondent felt that the bananas were more ripe than it desired. It said that they were in stage number 3 insofar as ripeness is concerned. Therefore, respondent rejected the bananas, and notified complainant of its rejection. The evidence is not clear whether such rejection was made in a timely fashion as is required by 7 CFR § 46.2(cc). Pursuant to that provision rejection of truck shipments must not exceed "8 hours after the receiver or a responsible representative is given notice of arrival and the produce is made accessible for inspection". In view of our analysis of the case, however, it is not necessary to make a determination as to whether the notification of rejection to complainant was timely.

Complainant asked for a Federal inspection of the bananas. Such inspection could not occur until January 3, 1984, due to the New Year's holiday. The Federal inspection showed that the bananas arrived in good condition. Indeed, there was no showing that there were any condition defects whatsoever. The inspection certificate merely reflected the stage of ripeness four days after delivery to respondent. Even if we were to find that the bananas were overly ripe insofar as the contract specifications concerned, the Federal inspection having been taken four days after the bananas arrived in Memphis, Tennessee, we could not find what the condition of the bananas was upon their arrival simply because the inspection is

too remote in time. Furthermore, the extra day in transit is the responsibility of the respondent. In any event there is an overriding consideration which must be taken into account. The evidence in this proceeding, namely the invoice, does not reflect any requirement insofar as the ripeness of the bananas is concerned. Indeed, in a letter to Mr. Jack Morris of the United States Department of Agriculture dated January 6, 1984, Mr. Raoul Vanelli of respondent stated that:

"I called to inform him [Mr. Couch of complainant] that the majority of the bananas I checked were in a #3 stage according to Del Monte's banana chart. I purchase and store bananas either 240 or to 320 boxes to a cooler, 960 boxes in one load. I gas them to come out in succeeding days. These bananas were all breaking at one time and that would have been too many coming out at one time to sell.

I had on hand at that time 960 boxes which I had accepted December 23rd in a ripe and overripe and green condition from Del Monte because Mr. Couch explained they were having trouble with a load and he would cover any loss. These bananas were being re-worked and discarded on December 30th when I received the order in question. I felt that without protection of some sort this load would have been too many for me unless I could move them quickly."

The clear implication of Mr. Vanelli's statement, above, is that while normally he would accept bananas in a stage of number 3 ripeness, he was not in a position where he wished to do so on December 30, 1983, simply because he did not feel that he could sell them to his customers. Such circumstance is hardly the responsibility of the complainant. It is the responsibility of respondent, having entered into a contract with complainant which did not specify the stage of ripeness at which bananas were to arrive.

In view of the above, we have no choice but to conclude that respondent's rejection of the bananas was wrongful. Complainant took necessary action to mitigate damages by selling the bananas to Proffer Produce for a total sum of \$3,376.45, leaving \$2,534.53 of the original contract price unpaid. We find that respondent's failure to pay complainant \$2,534.53 is a violation of section 2 of the Act for which reparation should be awarded with interest.

ORDER

Within thirty days from the date of this order respondent shall pay to complainant, as reparation, \$2,534.53, with interest thereon at the rate of 13 percent per annum from February 1, 1984, until paid.

Copies of this order shall be served upon the parties.

AL HARRISON COMPANY DISTRIBUTORS a/t/a HARRISON MELON Co. OF ARIZONA v. GEORGE VILLALOBOS d/b/a TEKSUN BRAND INTERNATIONAL. PACA Docket No. 2-6805. Decided July 2, 1985.

Payment of undisputed amount.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely informal complaint was filed on August 20, 1984, and a formal complaint was filed on November 19, 1984. Complainant seeks to recover \$28,319.42 which amount is alleged to be the total purchase price for watermelon sold to and accepted by respondent in July, 1984. Respondent filed an answer to the formal complaint on March 22, 1985, admitting that \$11,944.72 of the amount claimed by complainant was due and owing to complainant on account of the transactions involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$11,944.72. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from August 1, 1984, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

MENDELSON-ZELLER Co., INC. v. WEST COAST PRODUCE SALES, INC.
PACA Docket No. 2-6816. Decided July 2, 1985.

Payment of undisputed amount.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely informal complaint was filed on October 30, 1984, and a formal complaint was filed on January 28, 1985. Complainant seeks to recover \$6,842.10 which amount is alleged to be the total purchase price for produce sold to and accepted by respondent in August and September 1984. Respondent filed an answer to the formal complaint on March 14, 1985, admitting that \$6,659.15 of the amount claimed by complainant was due and owing to complainant on account of the transactions involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$6,659.15. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 1½ percent per annum from October 1, 1984, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the

same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

BORDER FRUIT CO., INC. v. FRUIT DISTRIBUTING CORP. PACA Docket No. 2-6825. Decided July 2, 1985.

Payment of undisputed amount.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely informal complaint was filed on July 2, 1984, and a formal complaint was filed on September 27, 1984. Complainant seeks to recover \$17,497.00 which amount is alleged to be the total purchase price for mangoes sold to and accepted by respondent in April and May, 1984. Respondent filed an answer to the formal complaint on April 8, 1985, admitting that \$6,450.00 of the amount claimed by complainant was due and owing to complainant on account of the transactions involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$6,450.00. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 18 percent per annum from June 1, 1984, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

OSHITA, INC. v. SCHWEGMANN BROTHERS GIANT SUPERMARKET.
PACA Docket No. 2-6688. Decided July 8, 1985.

Acceptance of commodity—Commercial unit—Reparation awarded.

Dennis Becker, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant

Ralph S. Johnson, New Orleans, Louisiana, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$6,689.00 in connection with the sale of three truckloads of mixed vegetables in interstate commerce.

A copy of the Department's report of investigation was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. The amount claimed as damages in the formal complaint does not exceed \$15,000.00. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Neither party did so. Complainant, however, filed a brief.

FINDINGS OF FACT

1. Complainant, Oshita, Inc., is a corporation with an address at P.O. Box 5218, Salinas, California.

2. Respondent, Schwegmann Brothers Giant Supermarkets is a partnership composed of S. Bros. Giant S. Mkt., Inc., Guy Schwegmann, #2 Tr, and John F. Schwegmann #2 Tr, with an address at P.O. Box 26099, New Orleans, Louisiana. At the time of the transactions involved herein respondent was licensed under the Act.

3. On July 22, 1983, complainant sold to respondent 200 cartons of onions at \$5.00 a carton plus 65 cents per carton for precooling and palletizing, and \$400.00 for prepaid freight, for a total contract price of \$1,530.00. The onions were shipped in interstate commerce

from complainant to respondent, and arrived at respondent's place of business on or about July 26, 1983. Panda Produce Company of San Bernardino, California, acted as the broker with respect to this transaction.

4. With respect to the transaction set forth in paragraph 3, above, upon receipt of the goods respondent secured a federal inspection. It showed with respect to their condition: "Damage by yellow leaves range from 14 to 22%, average 18%. No decay. Remainder firm: tops good green color." Mr. Theresa of Panda Produce conveyed the information to complainant, which agreed that the onions should be sent to a repacker for reconditioning, and that a price would be negotiated after sale. Respondent and complainant did not enter an agreement with respect to a modified price, and respondent has paid complainant no part of the original contract price.

5. On August 16, 1983, complainant sold to respondent 340 cartons of Jumbo onions at \$5.00 a carton plus 65 cents for precooling and palletizing for a total price of \$1,921.00, five cartons of Endive lettuce at \$6.50 a carton plus 80 cents for precooling and palletizing for a total price of \$36.50, 20 cartons of Romaine lettuce at \$5.00 a carton plus 80 cents for precooling and palletizing for a total price of \$116.00, five cartons of Escarole lettuce at \$4.00 a carton plus 80 cents for precooling and palletizing for a total price of \$24.00, and 10 cartons of spaghetti squash at \$7.00 a carton for a total price of \$70.00, plus \$16.00 for loading and \$760.00 for prepaid freight for a total contract price of \$2,963.50. On or about August 16, 1983, complainant shipped the produce to respondent, where it was received and accepted by respondent. Panda Produce Company acted as the broker.

6. There was no federal inspection with respect to the load of produce described in paragraph 5, above. Mr. George Theresa of respondent indicated that the onions had arrived showing yellowed tops. Respondent requested that complainant allow the onions to be sent to a repacker. Complainant allowed such action to be taken, with the understanding that a price adjustment would be discussed with respondent after the onions were sold. Respondent and complainant did not enter an agreement with respect to a modified price. Respondent paid \$381.90 with respect to the load of produce, leaving \$2,681.60 unpaid.

7. On August 17, 1983, complainant sold to respondent 200 cartons of Jumbo onions at \$5.00 a carton plus 65 cents a carton for precooling and palletizing for a total price of \$1,330.00, five cartons of Endive lettuce at \$7.00 a carton plus 80 cents for precooling and palletizing for a total price of \$39.00, five cartons of Escarole let-

tuce at \$4.00 a carton plus 80 cents per carton for precooling and palletizing for a total price of \$24.00, 30 cartons of red leaf lettuce at \$7.00 a carton plus 80 cents a carton for precooling and palletizing for a total price of \$234.00, 30 cartons of Boston lettuce at \$6.00 a carton plus 80 cents a carton for precooling and palletizing for a total price of \$204.00, 20 cartons of green leaf lettuce at \$13.15 a carton for a total price of \$263.00, 20 cartons of red onions at \$13.00 a carton for a total price of \$260.00, and 10 cartons of zucchini squash at \$4.15 a carton for a total price of \$41.50, for a total contract price of \$2,195.50. The load of produce was shipped in interstate commerce by complainant to respondent where it arrived approximately August 22, 1983. Panda Produce was the broker in the transaction.

8. A federal inspection was held on August 22, 1983, of 125 cartons of the Jumbo onions. It showed in pertinent part as regards condition that: "Bulb firm. No decay. Tops mostly fresh and good green color. Damage by yellow tops range 6 to 24%, average 16%. Average 1% decayed." As a result of the inspection complainant agreed through Mr. George Theresa of Panda Produce that respondent should send the onions out for repacking. They were then to be sold by respondent after which an adjustment in price would be discussed between complainant and respondent. Respondent and complainant did not enter an agreement with respect to a modified price. Respondent has paid complainant a total of \$1,176.25 with respect to the produce involved in the transaction set forth in paragraph 7, above, leaving a balance unpaid of \$1,019.25.

9. Respondent has failed to pay complainant with respect to the three transactions a total of \$5,180.85.

10. A formal complaint was filed in this proceeding on August 2, 1984. An informal complaint was filed on October 3, 1983, which was within nine months of the time the causes of action herein accrued.

DISCUSSION

This proceeding involves a dispute between complainant and respondent with respect to the quality of Jumbo onions in three transactions. With respect to the first transaction which occurred on July 22, 1983, only onions were included in the load of produce shipped by complainant to respondent. With respect to the other two transactions, i.e., those which occurred on August 16, 1983, and August 17, 1983, there were other types of produce involved in the transaction as well. There were federal inspections of the onions sold on July 22, 1983 and August 17, 1983, which showed a significant percentage of yellow tops. Because of the yellowing of the

onions as shown by the two inspections, and the alleged yellowing of the onions as regards the third transaction, respondent has not paid complainant the full agreed upon contract price. Rather, it claims it is entitled to deductions due to that condition defect. We cannot agree.

Respondent claims that it rejected the Jumbo onions involved in each transaction. Such could be the case only with respect to the transaction which occurred on July 26, 1983. However, as will be discussed below, respondent did accept those onions. With respect to the other two transactions, however, it makes no difference whether they were inspected. The overriding legal principle is that because there were other commodities involved in the transactions, which commodities were accepted by respondent, the onions were accepted as well. Under the PACA a truckload of perishable agricultural commodities must be treated as a commercial unit. *Salinas Lettuce Farmers Cooperative v. Larry Ober Company*, 89 Agric. Dec. 65, 67-70 (1980). Therefore, having accepted the other commodities, respondent also is held to have accepted the onions regardless of their condition. Under such circumstances respondent must prove the damages it actually suffered as a result of any deteriorated condition of the product involved. Respondent has failed to do so.

With respect to all three transactions respondent, acting through George Theresa of Panda Produce, negotiated with complainant to have the onions reconditioned by some other business entity. Complainant acceded to respondent's desire in this regard. Complainant contends that price adjustments were to be given after the onions were resold. However, complainant avers that such price adjustments were not discussed thereafter, and that respondent never provided it any information as regards the quantity of onions which were resold after reconditioning, or the price fetched with respect thereto. Respondent has provided no evidence in this record to show the quantities of onions resold or the prices fetched for them. In view of this respondent has failed to sustain its burden of proof as to the damages which it suffered insofar as the latter two transactions are concerned. With respect to the first transaction, having agreed to have them reconditioned, we find that respondent accepted the onions. Under these circumstances it must also prove actual damages since there was no agreement to a price adjustment after resale. It has provided no information showing the entity sold nor the prices fetched. Therefore, with respect to all three transactions respondent has failed to sustain its burden of proof as to damages.

Respondent has failed to pay complainant \$5,180.85 with respect to the three transactions involved in this proceeding. We find that respondent's failure to pay this amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order respondent shall pay to complainant as reparation \$5,180.85, with interest thereon at the rate of 13% per annum from October 1, 1983, until paid.

Copies of this order shall be served upon the parties.

BIANCHI & SONS PACKING Co. *v.* WEST COAST PRODUCE SALES, INC.
PACA Docket No. 2-6828. Decided July 8, 1985.

Payment of undisputed amount.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely informal complaint was filed on January 25, 1985, and a formal complaint was filed on March 1, 1985. Complainant seeks to recover \$20,957.50, which amount is alleged to be the total purchase price for tomatoes sold to and accepted by respondent in August and September, 1984. Respondent filed an answer to the formal complaint on May 1, 1985, admitting that \$20,614.35 of the amount claimed by complainant was due and owing to complainant on account of the transactions involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount \$20,614.35. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 1

percent per annum from October 1, 1984, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

GOURMET PRODUCE SPECIALTIES *v.* RUSSO FARMS, INC. PACA Docket No. 2-6468. Decided July 9, 1985.

Contract term—Rejection—Transportation services and conditions—Suitable shipping condition—Dismissed.

George S. Whitten, Presiding Officer.
Complainant, *pro se*.

David A. Cuccio, Vineland, New Jersey, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$6,806.03 in connection with the sale of a truckload of mixed produce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed as damages in the formal complaint does not exceed \$15,000.00, and accordingly the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure complainant filed an opening statement, respondent filed an answering statement, including several depositions, and complainant filed a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Gourmet Produce Specialties, is a partnership composed of Esther Sokoloff, Evelyn Lipshultz, and Lea Lipshultz, whose address is P.O. Box 21302, Los Angeles, California.

2. Respondent, Russo Farms, Inc., is a corporation whose address is 1962 South East Avenue, Vineland, New Jersey. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about May 23, 1983, complainant sold to respondent one truckload of mixed produce consisting of 387 cartons of beets at \$10.50 per carton, 154 crates of kohlrabi at \$9.00 per carton, 20 bags of black radishes at \$18.00 per bag, 100 bags of turnips at \$8.50 per bag, 191 lugs of parsley roots at \$8.50 per bag, and ice at \$122.20, for a total of \$8,305.20 f.o.b.

4. On May 23, 1983, complainant shipped the produce listed above, by truck, from its place of business in Los Angeles, California, to respondent in Vineland, New Jersey. The produce arrived on May 26, 1983, and was promptly rejected by respondent.

5. At the request of Russo Farms, Inc., a federal inspection was made on May 26, 1983, at 2:35 p.m., at the place of business of complainant, while the produce was still on the truck. Such inspection showed in relevant part as follows:

Condition of Equipment.	Vents closed, doors open, temperature control unit in operation.
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Products Inspected:	Bunched BEETS in fiberboard cartons printed "Six Wheels, Santa Clara Produce, Inc. Oxnard, Ca. 93031" and marked "2 dozen Beets" and bunched PARSLEY ROOTS in used unlidded lugs of various sizes with no distinguishing marks and Topped Purple Top Turnips in film bags printed "Gazelle Turnips, Gesell Distributing Co., Inc., 1809 Industrial Street, Los Angeles, Calif. 90021, Net wt. 25 lbs" and Topped Black RADISHES in film bags, no marks and bunched KOHLRABI in used wirebound crates of various sizes, no marks.
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Applicant's count: <i>Beet</i> lot 387 cartons; <i>Parsley Root</i> lot 191 lugs; <i>Turnip</i> lot 100 bags; <i>Radish</i> lot 20 bags; <i>Kohlrabi</i> lot 154 crates.
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Condition of Load:

Beet lot in foremost portion of trailer, cartons lengthwise, 6 rows, 5 layers. In each stack, rear portion of all cartons sloped 6 to 12 inches below front portion of cartons. Cartons water-soaked; 1 to 2 inches of crushed ice over a few top layer cartons. *Turnip lot* in central portion of trailer, bags lengthwise, 8 rows, 4 and 5 layers, on top of which *Radish lot* lengthwise, 4 and 8 rows, 2 and 3 layers. *Parsley Root lot* in central portion of trailer, lugs lengthwise, 6 rows, 6 layers. In each stack, all lugs shifted so that rear portion of lugs settled 3 to 5 inches inside lugs below; $\frac{1}{2}$ to 1 inch crushed ice over a few top layer lugs. *Kohlrabi lot* in rear portion of trailer, crates lengthwise and crosswise, 4, 6 and 7 rows, 5 and 6 layers. All crates in upper 2 layers show broken slats.

Condition of Pack.

Beet and *Kohlrabi lots* fairly tight. *Parsley root lot* slack, 2 to 5 inches.

Temperature of Product:

Each lot at various locations 35°F to 49°F.

Condition:

Beet lot: Roots firm. Not soft rot. Tops mostly fresh and showing good characteristic color. From 29 to 54%, average 41% of bunches damaged by some to many yellow or brown discolored leaves with numerous black sunken discolored areas. No decay. *Parsley Root lot*: Roots firm. No soft rot. Tops generally fresh and showing good characteristic green color. Average 3% of bunches affected by some yellow or brown discolored leaves. No decay. *Turnip lot*: Roots firm. No soft rot. *Radish lot*: Roots mostly firm. Decay ranges 8 to 34%, average 21%, including 9% affecting trimmed tops. Decay is Bacterial Soft Rot in various stages. *Kohlrabi lot*: Bulbs generally firm. Average 2% decay. Bunches affected by some to many yellow leaves ranges 25 to 83%, average 61%. No decay.

Remarks	Inspection and certificate restricted to product and lading in radishes and in upper 3 layers of beets, parsley roots, turnips and kohlrabi
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6. Following the rejection by respondent, complainant turned the produce over to Prevor Marketing International, Hunts Point, Bronx, New York, and such produce was sold for gross proceeds of \$5,199.25. Prevor Marketing International remitted net proceeds to complainant, after deduction of freight and expenses, in the amount of \$1,499.17.

7. The formal complaint was filed on September 15, 1983, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Complainant alleges in the formal complaint that the truckload of mixed produce was sold to respondent "F.O.B. Los Angeles, California . . . with a rolling acceptance final". This allegation was not supported by any of the documentation submitted in this proceeding, nor was the allegation ever made again by complainant. Instead complainant alleged numerous times after the filing of the informal complaint and prior to the filing of the formal complaint that the produce was sold on a f.o.b. basis. Respondent, in its answer, denied the allegation of the complainant that the produce was sold on a f.o.b. rolling acceptance final basis, and instead asserted that the produce was sold to respondent "f.o.b. destination (Vineland, New Jersey)". In other words respondent maintains that this was a delivered sale, and respondent's manager Damien E. Russo expressly asserted in the answering statement that the sale was on a delivered basis. None of the documentation relative to the transaction states whether the sale was on a delivered basis or a f.o.b. basis. Except for the aberrant and inexplicable allegation in the complaint that the sale was on a rolling acceptance final basis complainant has consistently maintained throughout these proceedings that the sale was on a f.o.b. basis. In addition, it is clear from the record that the negotiations leading to the sale of the truckload of mixed produce were handled on respondent's behalf by Sal Russo, president of respondent corporation. This is the consistent allegation of Esther Sokoloff, and respondent's own purchase order states that the produce was "ordered from Esther" and "ordered by Sal". Since Sal Russo nowhere gave a statement relative to the terms of the contract which he negotiated, and since Esther

Sokoloff did give such a statement on several occasions, in which she alleged that the terms were f.o.b., we find that the contract terms were f.o.b. Los Angeles.

It is clear from the deposition testimony of Esther Sokoloff that respondent gave explicit notice of rejection immediately after receipt of the truckload of mixed produce. (Deposition of Esther Sokoloff and Evelyn Lipshultz, page 12, lines 20-22, and page 38, lines 3-9). Where an effective rejection is made the burden is on the shipper to show that such rejection was wrongful, and where the rejected commodity was sold on a f.o.b. basis the shipper also has the burden of proving that transportation services and conditions were abnormal so as to void the warranty of suitable shipping condition. *Bud Antle v. J. M. Fields*, 38 Agric. Dec. 844 (1979). See also *Tenneco West, Inc. v. Gilbert Distributing Co.*, 38 Agric. Dec. 488 (1979), *Heggeblade-Marguleas-Tenneco v. Fisher Foods*, 38 Agric. Dec. 1443 (1974) and *Bud Antle v. Bohack*, 32 Agric. Dec. 1589 (1973).

The high percentage (average 41%) of damage by yellow or brown discolored leaves with numerous black sunken discolored areas in the beets, and the damage (average 61%) by yellow leaves in the Kohlrabi, together with the decay (average 21%) in the radishes, as disclosed by the federal inspection taken shortly after arrival, demonstrate that the larger portion of the load was abnormally deteriorated on arrival. The important question, therefore, for our consideration here, is whether complainant has met its burden of proving by a preponderance of the evidence that transportation services and conditions were abnormal so as to void its warranty of suitable shipping condition. It is clear that the total elapsed time between time of shipment and time of arrival was exceptionally short. While the temperatures, extending as they did to 49°F, were somewhat high, the commodities were exposed to such temperatures for only a short period of time. In addition, the testimony offered by complainant shows that the various commodities were unloaded directly into its warehouse on the morning of the day of shipment and were not placed in the cooler. There is no indication in the record that any of the commodities were precooled. Also, complainant's testimony makes it clear that the loading of the commodities was directly supervised by a principal of complainant and was not done by the truck drivers or their agents. The federal inspection discloses that the parsley roots were in "unlidded bags of various sizes" and the Kohlrabi was in used wirebound crates of various sizes. The shifting of the load which is noted on the federal inspection, and which may have caused the high temperatures by impeding air circulation, could easily be viewed as the

responsibility of the complainant due to the irregular sizes of the containers and the manner in which they were loaded. In any event, we cannot say that complainant has met its burden of proving transportation services and conditions which were abnormal, and which were not caused by the shipper. (See 7 CFR § 46.43(i)). Accordingly, the warranty of suitable condition is applicable and the condition of the commodities on arrival shows that such warranty was breached by complainant.

In view of the foregoing discussion, we conclude that respondent's rejection of the truckload of mixed produce was with cause. Consequently, the complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

CORKY FOODS CORP. v. TRAY-WRAP, INC. PACA Docket No. 2-6654.
Decided July 9, 1985.

Contract term—Grade of produce—Suitable shipping condition—Damages unproved—Reparation awarded.

Andrew Y Stanton, Presiding Officer.
John J. McLaughlin, Washington, D.C., for complainant
Linda Strumpf, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et. seq.*). A timely complaint was filed in which complainant seeks a reparation award in the amount of \$7,117.20 in connection with the sale and shipment of a quantity of tomatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of the Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of veri-

fied statements as well as to file briefs. Complainant submitted an opening statement and respondent filed an answering statement. Complainant elected not to submit a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Corky Foods Corp., is a corporation whose address is 3452 West Boynton Beach Boulevard, Plaza West, Suite 9, Boynton Beach, Florida.

2. Respondent, Tray-Wrap, Inc., is a corporation whose address is 266 N.Y.C. Terminal Market, Bronx, New York. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately January 12, 1984, complainant sold to respondent, through Steven Heyer Broker, Dade County, Florida, a quantity of tomatoes, 85% U.S. No. 1, consisting of 1,438 twenty-five pound cartons, including 258 cartons of 5×6 tomatoes at \$14.15 per carton, 869 cartons of 6×6 tomatoes at \$13.15 per carton, 171 cartons of 6×7 tomatoes at \$11.15 per carton, and 140 cartons of 7×7 tomatoes at \$8.15 per carton, plus \$741.50 for gas and a temperature recorder, for a total of \$18,867.20, f.o.b. On January 12, 1984, the broker issued a memorandum of sale reflecting this information.

4. The tomatoes were federally inspected at shipping point on January 12, 1984, and were found to meet the standards for U.S. Combination grade.

5. The tomatoes were gassed from January 12, 1984, until January 17, 1984, and were then shipped in interstate commerce to respondent, where they arrived on January 19, 1984. The tomatoes were unloaded, and on January 19, 1984, at 2:00 p.m., were subjected to a federal inspection, which found as follows, in relevant part:

Range 62 to 66°F.

Tomatoes in cartons printed "Corky 6×6 Fla." *Applicant states 1440 cartons.*

Quality Grade defects ranged 16 to 36% average 27% scars, catfaces, misshapen condition. Average approximately 5% green and breakers, 20% turning and pink, 60% light red to red. Average 4% soft. Decay ranges 4 to 16% average 12% Bacterial Soft Rot in various stages. 6 to 12% average 10% damage by numerous slightly sunken discolored areas occurring over shoulders.

GRADE: Now approximately 45% U.S. No. 1 quality (4% soft, 12% decay).

6. In April 1984, respondent gave complainant a check for \$11,750.00, which was accepted by complainant as partial payment. Respondent has not paid the remaining portion of the contract price in the amount of \$7,117.20.

7. A formal complaint was filed on July 20, 1984, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Respondent admittedly accepted the load of tomatoes purchased from complainant, but claims to be without liability for the unpaid portion of the contract price in the amount of \$7,117.20, alleging that the tomatoes were not of the grade specified by the contract, and also were in poor condition. Having accepted the tomatoes, respondent is liable for the contract price therefore, less damages resulting from any breach of warranty or contract by complainant. It is respondent's burden to prove the breach and damages by a preponderance of the evidence. *Santa Clara Produce, Inc. v. Caruso Produce Inc.*, 41 Agric. Dec. 2279 (1982).

Respondent's claim that the tomatoes were not of the proper grade is supported by the evidence. In an affidavit filed as part of respondent's answering statement, the broker in this transaction states that the tomatoes were to be 85% U.S. No. 1. This provision was set forth in the July 12, 1984, broker's memorandum of sale as well (Finding of Fact 3). However, the tomatoes provided by complainant were found only to be 45% U.S. No. 1, as is evident from the January 19, 1984, destination inspection (Finding of Fact 5). That the tomatoes were not 85% U.S. No. 1 when shipped is clearly evident from the January 12, 1984, shipping point inspection, where the grade of the tomatoes is stated to be U.S. Combination (Finding of Fact 4). There was thus a breach of contract by complainant with respect to the grade of the tomatoes shipped.

The condition of the tomatoes revealed by the January 19, 1984, federal inspection was in breach of the implied warranty of suitable shipping condition given by complainant in this f.o.b. sale. See 7 CFR § 46.48(j). The inspection results show 4% soft, an average of 12% decay, and 10% damage by sunken, discolored areas, which is far in excess of the maximum damage allowed for the tomatoes to have made good delivery. Therefore, it is clear that complainant breached its warranty of suitable shipping condition as well.

We now turn to the question of damages resulting from complainant's breach. In its answer, respondent contends that its damages were \$7,117.20, which is the difference between the contract

price of \$18,867.20, and the price it paid to complainant of \$11,750.00. According to respondent, this latter figure is based on \$9.00 per carton for the 258 cartons of 5×6 tomatoes, or \$2,322.00, \$8.00 per carton for the 869 cartons of 6×6 tomatoes, or \$6,962.00, \$7.00 per carton for the 171 cartons of 6×7 tomatoes, or \$1,197.00, \$4.00 per carton for the 140 cartons of 7×7 tomatoes, or \$560.00, and \$719.00 for gassing. Respondent claims that these figures were derived from the January 19, 1984, inspection, and the cost of labor to grade the tomatoes. Respondent states that its calculation of damages shows an allowance of about 40% of the contract price, which is the discrepancy between the 85% U.S. No. 1 it contracted to receive and the 45% U.S. No. 1 it actually did receive.

Respondent's calculation of damages will not be accepted, however, as damages for breach of warranty are based on the difference between the actual value of the produce, which is usually determined by the results of a prompt and proper resale, and the value the produce would have had if it had been as warranted. *C.J. Prettyman, Jr., Inc. v. D.J. LaMantia Inc.*, 41 Agric. Dec. 1614 (1982). There is no way to determine from the record the actual value of the tomatoes. Respondent has not alleged that it resold them. The allowances claimed by respondent appear to be completely arbitrary figures, as the record does not reflect that they were based on anything but respondent's own intuitive judgment as to the actual value of the tomatoes. The cost of labor, as claimed by respondent, may be awarded as incidental damages for breach of warranty, if adequately proved. However, respondent has provided no proof as to its labor costs, nor has it even alleged the specific sum which it claims to have spent. Therefore, as a result of respondent's total failure to provide any evidence as to the value of the tomatoes it accepted, and what it spent for labor, we must conclude that respondent has failed to sustain its burden of proving that it incurred any damages herein.

Respondent is thus liable for the difference between the contract price of \$18,867.20, and the \$11,750.00 already paid, or \$7,117.20. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$7,117.20, with interest thereon at the rate of 18% per annum from February 1, 1984, until paid.

Copies of this order shall be served upon the parties.

PACIFIC FARM COMPANY *v.* CORGAN & SON, INC. PACA Docket No. 2-6835. Decided July 9, 1985.

Payment of undisputed amount.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed on December 17, 1984. Complainant seeks to recover \$29,038.80 which amount is alleged to be the total purchase price for mixed produce sold to and accepted by respondent in the period April 20-September 8, 1984. Respondent filed an answer to the formal complaint on April 11, 1985, admitting that \$11,090.60 of the amount claimed by complainant was due and owing to complainant on account of the transactions involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$11,090.60. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from September 1, 1984, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

FRESH PAK, INC. v. DEKLE BROKERAGE CO., INC. PACA Docket No. 2-6455. Decided July 12, 1985.

Acceptance of commodity—Breach of warranty—Damages—Reparation awarded.

Andrew Y. Stanton, Presiding Officer
Complainant, *pro se*.
Respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$6,162.50 in connection with a load of potatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon the respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements as well as briefs. Respondent filed an answering statement and complainant filed a statement in reply.

FINDINGS OF FACT

1. Complainant, Fresh Pak, Inc., is a corporation whose address is P.O. Box 509, Pasco, Washington.

2. Respondent, Dekle Brokerage Co., Inc., is a corporation whose address is P.O. Box 2686, Mobile, Alabama. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On approximately February 15, 1983, complainant sold to respondent, through Trademark Produce & Sales (hereinafter sometimes referred to as "Trademark"), Kennewick, Washington, acting as the broker, 1,140 sacks of U.S. number 2 potatoes and 10 sacks of U.S. number 1 potatoes for \$3,225, plus \$22.50 for a Stires recorder, totalling \$3,247.50, f.o.b. The broker prepared a confirmation of sale reflecting these terms and, on February 15, 1983, sent it to both complainant and respondent.

4. Complainant shipped the potatoes by car in interstate commerce to respondent, where they arrived at 1:30 p.m. on February

25, 1983, a Friday. Freight charges were \$4,115, which complainant eventually paid. On Monday, February 28, 1983, at 2:45 p.m., respondent secured a federal inspection which found as follows, in relevant part:

Condition of Equipment:	Temperature controls not in operation.
Products Inspected	Long Russett POTATOES in burlap sacks marked "Perfection Brand Washington Potatoes, 100 Lbs Net Weight, Fresh Pak, Inc, Pasco, Wash.". Applicant's count 1150 sacks.
Condition of Load	Through load 4 to 7 rows, 5 to 9 layers.
Temperature of Product:	Various locations; 46°, 48°, 46°.
Condition:	Generally firm Decay most samples 5 to 13%, many none, average 4% Bacterial Soft Rot and/or wet type Fusarium Tuber Rot in various stages.
Remarks:	Inspection made during unloading process.

5. At approximately 6:50 a.m., Pacific Standard Time, on March 1, 1983, respondent contacted the broker and advised that it was rejecting the car. On March 2, 1983, complainant told the broker to inform respondent that complainant did not accept respondent's attempted rejection. The broker immediately conveyed complainant's message to respondent.

6. On approximately March 10, 1983, the car was resold to Claude Bailey Company, Pensacola, Florida, for \$1,200, excluding freight.

7. Respondent has failed to make any payment to complainant for the potatoes at issue.

8. A formal complaint was filed on October 24, 1983, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Respondent admits purchasing the carload of U.S. number 2 potatoes involved herein, but claims that it bought them from Trademark, not complainant. Respondent contends that Trademark had represented to it that the potatoes, while U.S. number 2, were really U.S. number 1 in appearance. However, when the load arrived, the vast majority of the potatoes were revealed to be inferior

in quality to U.S. number 1 potatoes as well as in poor condition. Respondent states that it thus rejected the car and was not informed until one week later that complainant was not accepting its rejection.

Respondent's contention that Trademark, not complainant, was the seller is not borne out by the evidence. The record contains a confirmation of sale issued by Trademark on February 15, 1983, showing complainant as the seller and respondent the buyer, with Trademark acting as the broker. In a letter to the Department filed on June 28, 1983, Trademark stated that the sale was made on February 15, 1983, from complainant to respondent. It is thus evident that at the time of the contract, the status of complainant as the seller, respondent as the buyer, and Trademark as the broker, was made clear to all three parties.

Respondent denies accepting the potatoes. There is no dispute that the car arrived at respondent's warehouse at 1:30 p.m. on Friday, February 25, 1983, the inspection occurred at 2:45 p.m. on Monday, February 28, 1983, and the broker was first informed of respondent's desire to reject at 6:50 a.m., Pacific Standard Time, or 8:50 a.m., respondent's time, on March 1, 1983. Section 46.2(dd)(3) of the Department's regulations (7 CFR 46.2(dd)(3)) provides that acceptance occurs upon the failure of the consignee to give notice of rejection to the consignor within a reasonable time. A reasonable time with respect to rail shipments of fresh produce, such as that involved here, is defined in 7 CFR 46.2(cc)(2) as "not to exceed 24 hours after notice of arrival and the car has been placed in a location where the produce is made accessible for inspection" In 7 CFR 46.2(cc)(3) it is provided that the 24 hour period will be extended until the receiver is able to obtain a federal inspection plus two hours after it is given the inspection results. Therefore, respondent had until two hours after being informed of the results of the 2:45 p.m. February 28, 1983, inspection to notify complainant of its decision to reject. Respondent's failure to contact the broker until 8:50 a.m. the following day exceeds the reasonable time standard and constitutes an acceptance. Moreover, the inspection report for the February 28, 1983, inspection indicates that it took place while the produce was being unloaded. Even a partial unloading is an exercise of dominion and also constitutes an acceptance. *Mario Saikhon v. Russell-Ward Company, Inc.*, 34 Agric. Dec. 1940 (1975).

Having accepted the potatoes, respondent became liable for the contract price, less damages due to any breach of warranty. Respondent bears the burden of proving the breach and damages by a preponderance of the evidence. *Farm Market Service, Inc. v. Albertson's Inc. a/k/a Southco Division*, 42 Agric. Dec. 429 (1988). Re-

spondent contends that there was a breach of an express warranty given by the broker that the potatoes would be U.S. number 1 in appearance with minor defects. This contention is completely without merit, as neither the broker nor complainant ever told respondent that the potatoes were anything but U.S. number 2. Respondent was well aware that it was purchasing U.S. number 2 potatoes and, therefore, was being charged a low price commensurate with such potatoes. If respondent expected potatoes of U.S. number 1 quality while being charged a U.S. number price, such expectation was completely unwarranted. Although there was no breach of any express warranty, the February 28, 1983, inspection does reveal a breach of the suitable shipping condition warranty given by complainant in this f.o.b. sale (see 7 CFR 46.48,(j)).

As damages for complainant's breach of warranty, respondent is entitled to the difference between the actual value of the potatoes at the time and place of acceptance and their value if they had been as warranted. For the actual value of the potatoes, we will use the \$1,200 for which complainant resold the potatoes to Claude Bailey Company, Pensacola, Florida. Although such sale took place on approximately March 10, 1983, 11 days after the potatoes were accepted, we believe that the value of the potatoes stayed essentially the same during this period. To this figure, we must add the freight paid by complainant of \$4,115.00 and the cost of a Stires recorder of \$22.50, for a total of \$5,337.50. For the value of the potatoes if they had been as warranted, we cannot use the Market News Services Reports listings because they do not reflect prices for U. S. number 2 potatoes. Therefore, we will use the contract price plus freight for this transaction of \$7,362.50. Respondent's damages due to complainant's breach of warranty are thus \$7,362.50, less \$5,337.50, or \$2,025.00.

Respondent is liable for the contract price of \$8,347.50, minus its damages resulting from complainant's breach of warranty in the amount of \$2,025.00, or \$1,222.50. To this figure must be added incidental damages of \$4,115.00 for the freight paid by complainant, which expense was legally an obligation of respondent in this f.o.b. transaction. Complainant's damages therefore total \$5,337.50. Respondent's failure to pay complainant this sum is a violation of Section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$5,337.50, with interest thereon at the rate of 13% per annum from April 1, 1983, until paid.

Copies of this order shall be served upon the parties.

NORTHWEST FRESH, INC. v. ROBERTO H. GUTIERREZ d/b/a GUTIERREZ
DISTRIBUTING. PACA Docket No. 2-6588. Decided July 12, 1985.

Breach of warranty—Counterclaim—Reparation awarded.

Andrew Y. Stanton, Presiding Officer

Complainant, *pro se*

Margaret A. Teague, Chula Vista, California, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$5,000.00 in connection with a shipment of apples in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability and asserting a counterclaim in the amount of \$5,445.00 in connection with the subject matter of the complaint.

Since the amount claimed as damages does not exceed 15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements as well as to file briefs. Complainant submitted an opening statement, respondent submitted an answering statement, and complainant submitted a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Northwest Fresh, Inc., is a corporation whose address is P.O. Box 2191, Wenatchee, Washington. At the time of the transaction alleged herein in the counterclaim, complainant was licensed under the Act.

2. Respondent, Roberto H. Gutierrez d/b/a Gutierrez Distributing, is an individual whose address is 1031 Bay Boulevard, Suite H., Chula Vista, California. At the time of the transaction involved herein in the complaint, respondent was licensed under the Act.

3. On June 29, 1983, complainant sold to respondent a trucklot of apples consisting of 350 cartons of golden delicious extra fancy, and 700 cartons of red delicious extra fancy, at \$11.00 per carton, for a total of \$11,550.00, f.o.b. A transit temperature of 32°F. was to be maintained. It was agreed that the apples would meet export requirements.

4. On June 29, 1983, at 11:45 a.m., complainant had the 350 cartons of golden delicious apples subjected to a federal shipping point inspection, which found as follows, in pertinent part:

Products:

APPLES: *Golden Delicious* 350 tray pack cartons. STIRLING BRAND. Size 80's manifested Grade defects average within tolerances. Firm ripe. Less than $\frac{1}{2}$ of 1% decay. U.S. EXTRA FANCY

Cartons marked NN CA 317.

Meets U.S. Condition Standards.

MEETS THE REQUIREMENTS OF
EXPORT APPLE AND PEAR ACT.

At 10:30 a.m. on June 29, 1983, complainant had the 700 cartons of red delicious apples subjected to a federal shipping point inspection, which found as follows:

Products:

APPLES: *Red Delicious*. 700 tray pack cartons. BLUE BIRD BRAND. Size 80's manifested Generally 66% to full red color. Grade defects within tolerances. Firm ripe. Less than $\frac{1}{2}$ of 1% each of internal breakdown and decay. U.S. EXTRA FANCY

Cartons stamped IN CA 116.

Meets U.S. Condition Standards.

MEETS THE REQUIREMENTS OF
EXPORT APPLE AND PEAR ACT.

All 1,050 cartons of apples had been picked 11 months prior to the date they were inspected.

5. The apples subjected to the inspection were loaded on board a trailer bearing license number AT-13868-CAL., with temperature controls set at 32°F., and shipped from complainant in interstate commerce to respondent in Chula Vista, California, where they arrived on approximately July 2, 1983. Upon arrival, 1,040 cartons of the apples were transferred onto another refrigerated trailer for shipment to respondent's customer in La Paz, Mexico. The trailer-load of apples was subjected to a border inspection by Mexican authorities at Tijuana, Mexico, on July 2, 1983. The inspection found as follows, in relevant part:

Procedencia Wenatchee, Washington USA

Destino La Paz B.C. Sur

Remitente Roberto Gutierrez

Destinatario Bodega La Paz

Aduana de entrada Tijuana B.C. Mexico

Medio de transporte Trailer Refrigerado 32°F

Observaciones Carga muy madura en Medianas condiciones

The English translation of the words next to "Observaciones" is as follows: "Cargo is very ripe and in fair condition."

6. In early August 1983, respondent notified complainant that there were problems with the apples in La Paz, Mexico. Complainant refused to grant any adjustment.

7. In September 1983, respondent paid complainant \$6,550.00 for the apples, but has failed to pay any additional portion of the contract price.

8. A formal complaint was filed on February 13, 1984, which was within nine months from when the cause of action herein accrued. A counterclaim was filed on June 11, 1984, concerning the transaction alleged in the complaint.

CONCLUSIONS

Respondent does not deny purchasing, receiving, and accepting the apples from complainant as alleged in the complaint. However, respondent claims that their condition was poor, and as a result, only a portion could be resold. Respondent alleges that due to complainant's failure to deliver the apples in proper condition, respondent suffered damages of \$5,445.00, which figure it claims in its counterclaim. In its answering statement, respondent appears to be amending its counterclaim, stating that the amount it paid for freight and its remittance to complainant total \$1,154.00 more than the proceeds it realized on resale.

Since respondent admittedly accepted the apples, it became liable for the contract price, less damages resulting from any

breach of warranty, which respondent has the burden of proving by a preponderance of the evidence. *Santa Clara Produce, Inc. v. Caruso Produce Inc.*, 41 Agric. Dec. 2279 (1982). As this was a f.o.b. sale, complainant gave the implied warranty of suitable shipping condition, which means that complainant warranted that the apples, at the time of billing, would be in a condition which, if handled under normal transportation service and conditions, would assure delivery without abnormal deterioration at the contract destination agreed upon between the parties. 7 CFR 46.43(j).

As evidence of breach of warranty, respondent refers to an inspection taken at the Mexican border, in Tijuana, Mexico, on July 2, 1983 (Finding of Fact 5). That inspection apparently took place after the load had arrived at respondent's place of business on July 2, 1983, and all but 10 cartons had been transferred to another trailer for shipment to respondent's customer in La Paz, Mexico. The findings of the Mexican inspection are very brief, and state merely that the apples were very ripe and in fair condition. These findings are not sufficiently specific to establish a breach of warranty by complainant. In addition, the suitable shipping condition warranty applies only to the contract destination, which the parties agree was Chula Vista, California. The condition of the apples in Tijuana, some hours after they had arrived in Chula Vista and been transferred to another trailer, is not necessarily an accurate representation of their condition when they arrived at Chula Vista.

Respondent emphasizes that complainant has admitted that the apples were picked 11 months prior to shipment, and claims that this is a strong indication that they were not in the unripe state called for by the contract. However, there is no evidence to support respondent's assertion that the contract required the apples to be unripe. The June 29, 1983, federal shipping point inspections found both the red and golden delicious apples to meet U.S. condition standards and export requirements (Finding of Fact 4). Therefore, the fact that the apples were picked 11 months earlier is not, in and of itself, evidence of a breach of warranty.

As respondent has failed to prove any breach of warranty by complainant, it is liable for the contract price of \$11,550.00, less the \$6,550.00 it has already paid, leaving \$5,000.00. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest. Respondent's counterclaim is based on the existence of a breach of warranty by complainant, and in the absence of such breach, it is without merit and must be dismissed.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$5,000.00, with interest thereon at the rate of 13 percent per annum from August 1, 1983, until paid.

The counterclaim is hereby dismissed.

Copies of this order shall be served upon the parties.

HAROLD L. SCHACHNER d/b/a WONDERFUL PRODUCE & BROKERAGE
Co. v. WINIFRED HORMAN d/b/a ALLEN PICKLE WORKS. PACA
Docket No. 2-6694. Decided July 12, 1985.

Suitable shipping condition—Inspection—Breach of warranty—Counterclaim—Reparation awarded.

Andrew Y. Stanton, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$4,056.90 in connection with the sale and shipment to respondent of a quantity of cucumbers in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability. Respondent also filed a counterclaim and set-off in the amount of \$4,620.00 in connection with the transaction involved in the complaint.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but elected not to do so.

FINDINGS OF FACT

1. Complainant, Harold L. Schachner d/b/a Wonderful Produce & Brokerage Co., is an unincorporated association whose address is

80-82 Temple Avenue, Hackensack, New Jersey. At the time of the transaction involved in the counterclaim, complainant was licensed under the Act.

2. Respondent, Winifred Horman d/b/a Allen Pickle Works, is an individual whose address is 296 Cedar Swamp Road, Glen Head, New York. At the time of the transaction involved in the complaint, respondent was licensed under the Act.

3. On November 23, 1983, complainant sold to respondent a truckload of cucumbers consisting of 720 cartons for a total contract price, including pallets, ice and brokerage, of \$4,056.90, f.o.b. The cucumbers were supplied by Green River Produce, Nogales, Arizona.

4. The cucumbers had previously been shipped on November 15, 1983, from Green River Produce. They arrived at respondent's place of business on approximately November 23, 1983, and were accepted.

5. On December 2, 1983, respondent secured a federal inspection on a quantity of processed cucumbers, which revealed as follows:

PRODUCT INSPECTED	PICKLE (IN BRINE)
STYLED:	WHOLE
5 SAMPLES:	CONTAINED ONE MAJOR WORM DAMAGE.
1 SAMPLE:	CONTAINED ONE MAJOR DAMAGE WITH WORM
1 SAMPLE:	CONTAINED ONE LOOSE WORM
GRADE:	CERTIFICATE RESTRICTED TO ABOVE FACTOR ONLY UPON REQUEST OF APPLICANT.
REMARKS	THIS CERTIFICATE COVERS 90-55 GALLON DRUMS. PRODUCE PACKED IN 55 GALLON PLASTIC CONTAINERS LOCATED AT REAR APPLICANT'S PLANT.

6. Respondent has, to date, failed to pay any part of the contract price of \$4,056.90.

7. An informal complaint was filed on May 4, 1984, which was within nine months from when the alleged cause of action herein

accrued. A formal complaint was subsequently filed on October 5, 1984. An answer, including a counterclaim and set-off in the amount of \$4,620.00, was filed on November 20, 1984.

CONCLUSIONS

Respondent denies liability for the \$4,056.90 contract price, asserting that after it accepted the cucumbers, it was informed by its customers that the cucumbers were worm infested. Respondent claims that it incurred damages for its expenses for freight, for the pails in which the cucumbers were repacked, for carting away the worm infested product, for labor involved in discarding the load, and for the harm done to its business reputation. Respondent has filed a counterclaim and set-off in the amount of \$4,620.00 to recover these alleged damages.

In this f.o.b. sale, complainant gave the implied warranty of suitable shipping condition, which is defined in 7 CFR § 46.42(j) as meaning that the commodity, at the time of billing, is in a condition which, if handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon by the parties. As respondent accepted the cucumbers when they arrived at its place of business on approximately November 23, 1983, respondent became liable for the contract price, less damages due to any breach of warranty. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *Farm Market Service, Inc. v. Albertson's Inc.*, 42 Agric. Dec. 429 (1983).

Respondent has submitted a federal inspection dated December 2, 1983, which reveals major worm damage and infestation. The inspection certificate covers a processed product, cucumbers stored in brine in ninety 55 gallon drums, which respondent alleges are the same cucumbers it received from complainant, and the subject of the complaint herein. However, there is no evidence, other than respondent's own assertions, that the cucumbers inspected were those it had purchased from complainant. Even if they were the same cucumbers, it is significant that the December 2, 1983, inspection took place nine days after the cucumbers arrived at respondent's place of business, on November 23, 1983. We cannot conclude from the results of the December 2, 1983, inspection that the cucumbers were worm infested nine days earlier, especially when the cucumbers were processed in the interim. Therefore, it is concluded that respondent has failed to sustain its burden of proving any breach of warranty by complainant. Accordingly, respondent is liable for the entire contract price of \$4,056.00, and its failure to

pay such sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

As the counterclaim results from an alleged breach of warranty by complainant, which we have concluded did not occur, it is without merit and must be dismissed.

ORDER

Within thirty (30) days from the date of this order, respondent shall pay to complainant as reparation, \$4,620.00, with interest thereon at the rate of 13% per annum from January 1, 1984, until paid.

The counterclaim is hereby dismissed.

Copies of this order shall be served upon the parties.

GLENN V. RISDON, d/b/a ANTIGO POTATO BROKERAGE EXCHANGE *v.*
KATHERINE B. SCHMIEGE, d/b/a R&K SALES. Paca Docket No.
2-6844. Decided July 12, 1985.

Admission of indebtedness.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$1,694.00 in connection with a shipment of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Glenn V. Risdon, d/b/a Antigo Potato Brokerage Exchange, is an individual whose address is P.O. Box 484, Antigo, Wisconsin 54409. Respondent, Katherine B. Schmiege, d/b/a R&K Sales, is an individual whose address is 8188 Highway 64, Antigo, Wisconsin 54409. At the time of the transaction involved herein, respondent was operating subject to license under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of

the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$1,694.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$1,694.00, with interest thereon at the rate of 13 percent per annum from September 1, 1984, until paid.

Copies of this order shall be served upon the parties.

INTERNATIONAL FRESH & FROZEN FOODS, INC. d/b/a INTERNATIONAL FOOD DISTRIBUTORS *v.* JIMINI TRADING COMPANY. Paca Docket No. 2-6678. Decided July 19, 1985.

Counterclaim—Reparation awarded.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), hereinafter, "the Act." A timely complaint was filed in which complainant seeks an award of reparation against respondent in the total amount of \$1,711.50, in connection with the sale of a load of fresh okra in interstate commerce. A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent. Respondent failed to answer the complaint within the allotted time, and a Default Order was issued against it on September 12, 1984. However, subsequently respondent requested that this proceeding be reopened on the ground that it misunderstood oral instructions which it received from department employees concerning the necessity of formally answering the complaint. Respondent's petition to reopen was served on complainant, which failed to file an objection thereto, and an Order Reopening After Default was filed on October 30, 1984. Respondent then filed an Answer on December 5, 1984.

Since the amount claimed as damages does not exceed \$15,000, the shortened method of procedure set forth in the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence herein, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement (entitled Answering Statement). Respondent did not file an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. International Fresh & Frozen Foods, Inc., d/b/a International Food Distributors is a corporation whose business mailing address is P.O. Box 161333, Miami, Florida 33116.

2. Jimini Trading Company is a partnership composed of James C. Evans and John R. Lambert, Jr., whose business mailing address is P.O. Box 4887, McAllen, Texas 78501. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about December 22, 1982, complainant sold to respondent a load of whole and cut fresh okra for a total price of \$1,711.50. Title to the product, which was being held in storage in Memphis, Tennessee, was transferred to respondent and the product was subsequently sold and shipped by respondent to Hairston Produce Co., Dallas, Texas. Respondent received a payment of \$2,325.00 from Hairston Produce for the okra and shipping expenses.

4. An informal complaint in this proceeding was filed on August 15, 1983, which was within the nine months after the cause of action accrued. The formal complaint was then filed on May 29, 1984.

CONCLUSIONS

In its answer, respondent raises several questions concerning the validity of complainant's reparations claim. Respondent first denies ever doing business with the complainant, alleging that its transactions were with James Hines d/b/a International Food Marketing, Inc. Respondent's subsequent allegations, however, implicitly recognize complainant as a legitimate claimant, and attack the genuineness of the documentation filed by complainant to show an amount owing from respondent for a perishable agricultural commodity, that being whole and cut okra. Respondent also alleges that it never received title to the okra, but was simply handling it on consignment; that the agreement with complainant was to handle distressed okra; and that its actions do not constitute any violation of section 2 of the Act. At the same time, respondent admits owing complainant a lesser amount in connection with this transactions, but requests that any award in this proceeding be set-off against monies respondent believes will be awarded to it in PACA Docket No. RD-84-475.

Complainant's Answering Statement correctly points out that all of the documentation in the official file of this case, including that provided by respondent, indicates that the product sold was fresh okra and that respondent took title and received payment from the ultimate buyer for this product. Hence, one is left with respondent's admission that it owes complainant \$1,509.42 in connectio.

with this transaction and its proposal to hold any award in abeyance pending the resolution of PACA Docket No. RD-84-475. Since the official files of the Hearing Clerk of this Department reveal that PACA Docket No. RD-475 was resolved by a default order issued on March 11, 1985, all that now remains for consideration is the amount to be awarded to the complainant.

Respondent has claimed that only \$1,509.42 is owing, while complainant has claimed a higher figure of \$1,711.50. The difference in these figures is primarily due to a commission of \$232.50 which respondent specifically claimed in its Answer as a deduction from the total amount due. However, because respondent has failed to provide any documentation to support the validity of this claim for a commission, the deduction will be disallowed. Once this proposed commission is added to the \$1,509.42 admittedly owed by respondent, the total amount owing becomes \$1,741.92. Since this total is \$30.42 more than the amount claimed by the complainant and can not be explained by reviewing the official file in this proceeding, complainant will be awarded the lesser amount of \$1,711.50 which it requested.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$1,711.50, with interest thereon at the rate of 13% per annum from February 1, 1983, until paid.

Copies of this order shall be served upon the parties.

DOVEX INVESTMENT CORP. d/b/a DOVEX PACKING CO. v. T-G APPLE INCORPORATED. PACA Docket no. 2-6821. Decided July 19, 1985.

Admission of indebtedness.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$10,563.44 in connection with a shipment of apples in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appro-

priate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Dovex Investment Corp. a/t/a Dovex Packing Co., is a corporation whose address is P.O. Box 2300, Wenatchee, Washington. Respondent, T-G Apple Incorporated, is a corporation whose address is P.O. Box 399, Sebastopol, California. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$10,563.44. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$10,563.44, with interest thereon at the rate of 13 percent per annum from April 1, 1984, until paid.

Copies of this order shall be served upon the parties.

BUD ANTLE, INC. v. WEST COAST PRODUCE SALES, INC. PACA Docket No. 2-6849. Decided July 23, 1985.

Admission of indebtedness.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$1,231.20 in connection with two shipments of mixed vegetables in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Bud Antle, Inc., is a corporation whose mailing address is P.O. Box 1759, Salinas, California 93902. Respondent, West Coast Produce Sales, Inc., is a corporation whose mailing address is P.O. Box 3072, Visalia, California 93278. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$1,231.20. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$1,231.20, with interest thereon at the rate of 13 percent per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

Ito PACKING Co. Inc. v. WEST COAST PRODUCE SALES, Inc. PACA
Docket No. 2-6850. Decided July 23, 1985.

Admission of indebtedness.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$1,326.00 in connection with a shipment of grapes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Ito Packing Co., Inc., is a corporation whose mailing address is P.O. Box 707, Reedley, California 93654. Respondent, West Coast Produce Sales, Inc., is a corporation whose mailing address is P.O. Box 3072, Visalia, California 93277. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$1,326.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$1,326.00, with interest thereon at the rate of 13 percent per annum from November 1, 1984, until paid.

Copies of this order shall be served upon the parties.

S. STAMOULES, INC. d/b/a STAMOULES PRODUCE Co. *v* WEST COAST PRODUCE SALES, INC. PACA Docket No. 2-6851. Decided July 23, 1985.

Admission of indebtedness.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$1,113.00 in connection with three shipments of melons in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, S. Stamoules, Inc., is a corporation d/b/a Stamoules Produce Co. whose mailing address is P.O. Box 56, Menlo Park, California 93640. Respondent, West Coast Produce Sales, Inc. is a corporation whose mailing address is P.O. Box 3072, Visalia, California 93278. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$1,113.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$1,113.00, with interest thereon at the rate of 13 percent per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

PACIFIC FARM COMPANY *v.* WEST COAST PRODUCE SALES, PACA
Docket No. 2-6858. Decided July 23, 1985.

Admission of indebtedness.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$5,398.70 in connection with seven shipments of melons in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Pacific Farm Company is a corporation whose mailing address is 1047 M Street, Firebaugh, California 93622. Respondent, West Coast Produce Sales, Inc., is a corporation whose mailing address is P.O. Box 3072, Visalia, California 93278. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$5,398.70. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$5,398.70, with interest thereon at the rate of 13 percent per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

LOUIS LODEN d/b/a LOU LODEN v. OLIVER P. WOLFE d/b/a WOLVERINE FRUIT Co. PACA Docket No. 2-6655. Decided July 24, 1985.

Breach of warranty—Suitable shipping condition—Market decline—Reparation awarded.

Andrew Y. Stanton, Presiding Officer.

E Leigh Larson, Nogales, Arizona, for complainant

Tom Wilkins, McAllen, Texas, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$25,329.00, in connection with shipments of cucumbers and peppers in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting liability for \$16,927.68, but denying liability for the remaining amount alleged in the complaint.

Although the amount claimed as damages is in excess of \$15,000.00, the parties waived oral hearing. Therefore, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, and respondent submitted an answering statement. Complainant elected not to submit a statement in reply. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Louis Loden d/b/a Lou Loden, is an individual whose address is P.O. Box 34, Nogales, Arizona.

2. Respondent, Oliver P. Wolfe d/b/a Wolverine Fruit Co., is an individual whose address is P.O. Box 2642, Mission, Texas. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On February 28, 1984, complainant sold to respondent, through Bill Levinson Brokerage Co., Nogales, Arizona, acting as the broker, 695 crates of cucumbers for \$11.60 per crate, plus \$.50

per pallet for 695 pallets, totalling \$8,840.00, f.o.b. The contract did not provide for "select" cucumbers. Neither did the contract provide that respondent would be protected against market decline. There was no agreement at any time that the cucumbers were to be shipped to anywhere other than respondent's place of business in Mission, Texas. On approximately February 28, 1984, the broker issued a memorandum of purchase and sale reflecting the agreed upon contract terms.

4. The cucumbers were loaded on a truck bearing license number 426-755 Tenn., and shipped in interstate commerce to respondent, who received and accepted them upon their arrival at his place of business.

5. Complainant eventually sent respondent an invoice for \$8,840.00, which was returned by respondent. On the invoice respondent wrote that he was deducting \$2,731.32, because the cucumbers were supposed to be "select", and his receiver had reported problems. No price adjustment was ever granted by complainant.

6. On March 5, 1984, complainant sold to respondent, through Bill Levinson Brokerage Co., acting as broker, 1,134 cartons of bell peppers consisting of 420 cartons of extra large at \$15.00 per carton, 420 cartons of large at \$15.00 per carton, and 294 cartons of medium at \$13.00 per carton, plus \$.50 per pallet for 1,134 pallets, for a total contract price of \$16,989.00, f.o.b. There was no agreement at any time that respondent would be protected against market decline. On approximately March 5, 1984, the broker issued a memorandum of purchase and sale reflecting the agreed upon contract terms.

7. The peppers were shipped in interstate commerce to respondent, who received and accepted them upon their arrival at his place of business. No price adjustment was ever granted by complainant.

8. Complainant eventually sent respondent an invoice for \$16,989.00 in connection with the shipment of peppers. Respondent returned the invoice, and wrote on it that it was deducting \$5,670.00 due to market decline.

9. A formal complaint was filed on July 24, 1984, which was within nine months from when the causes of action herein accrued.

10. On November 14, 1984, an Order Requiring Payment of Undisputed Amount was issued, requiring respondent to pay to complainant \$16,927.68.

CONCLUSIONS

Respondent denies liability for the cucumbers in the amount of \$2,731.32, alleging that they were not "select" cucumbers as had

been ordered, and were not in good condition upon their arrival at Bronx, New York, the location of respondent's customer, Al Nagelberg & Company, Inc. Respondent also denies liability for the peppers in the amount of \$5,670.00, as he claims that the market declined after the purchase, and his contract with complainant provided for protection in the event of market decline.

As respondent does not deny accepting the cucumbers and peppers, he is liable for the contract price, less damages resulting from any breach of warranty or contract by complainant. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *Santa Clara Produce, Inc. v. Caruso Produce Inc.*, 41 Agric. Dec. 2279 (1982).

With respect to the cucumbers, respondent's contention that complainant breached the contract by not providing "select" cucumbers is without merit. Complainant denies that the contract called for "select" cucumbers, and the broker's memorandum of purchase and sale does not show that "select" cucumbers were ordered (Finding of Fact 3). Respondent relies on a March 6, 1984, inspection at Bronx, New York of 324 crates of cucumbers, to support his claim that the cucumbers at issue were not in good condition. However, there is reason to doubt that the cucumbers inspected were those which were shipped by complainant, as the inspection report states that the produce inspected was unloaded from a trailer with license number A76538 Me., while the subject cucumbers were loaded on a trailer with license number 426-755 Tenn. In addition, although respondent's argument is apparently that complainant violated his implied warranty of suitable shipping condition given in this f.o.b. sale, the suitable shipping condition warranty extends only "to the contract destination agreed upon between the parties." (7 CFR § 46.43(j)). Respondent does not dispute that the contract intended for the cucumbers to be shipped to his place of business in Mission, Texas, and not to his customer in Bronx, New York. Further, the broker's memorandum of purchase and sale contains absolutely no reference to a destination point other than respondent's place of business. Therefore, the cucumbers were not covered by complainant's suitable shipping condition warranty when they were subjected to the inspection. Even if it is assumed, *arguendo*, that the suitable shipping condition of warranty did apply, and the cucumbers subject to the inspection were those which had been shipped by complainant, the fact that the inspection covered only 324 out of the 695 crates of cucumbers shipped would render the inspection results of little value in determining the condition of the entire load. Therefore, it is abundantly clear that respondent has failed to sustain its burden of proving a breach

of warranty by complainant. Respondent is thus liable for the entire contract price for the cucumbers of \$8,340.00.

Regarding the peppers, respondent's only defense is that the broker represented that respondent would be protected against market decline. This contention is directly contradicted by the broker's memorandum of purchase and sale for this transaction (Finding of Fact 6), which is devoid of any reference to protection for market decline. Further, Mr. Levinson, representing the broker, has stated in an affidavit, which is part of complainant's opening statement, that he never conveyed to respondent any offer or acceptance of an adjustment for market decline made by complainant. Therefore, it is clear that respondent was never granted protection in the event of market decline. Respondent is thus liable for the contract price of the peppers in the amount of \$16,989.00.

We have found respondent to be liable for the full contract price for the cucumbers and peppers totalling \$25,329.00. An Order Requiring Payment of Undisputed Amount for \$16,927.68 was issued on November 14, 1984. Therefore, respondent remains liable for \$25,329.00 less \$16,927.68, or \$8,401.32. Respondent's failure to pay this amount to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$8,401.32, with interest thereon at the rate of 13% per annum from April 1, 1984, until paid.

Copies of this order shall be served upon the parties.

AGRA INC. v. J. A. WOOD CO-VISTA, INC. PACA Docket No. 2-6659.
Decided July 24, 1985.

Breach of warranty—Transportation services and conditions—Counterclaim—Acceptance of commodity—Suitable shipping condition—Dismissed.

Andrew Y. Stanton, Presiding Officer.

Complainant, *pro se*.

Thomas R. Oliveri, Newport Beach, California, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a repara-

tion award against respondent in the amount of \$1,221.00, in connection with the sale and shipment of a quantity of romaine and green onions in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability. Respondent also filed a counterclaim in the amount of \$2,005.50 in connection with the transaction which is a subject of the complaint. Complainant filed a reply, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant elected not to submit an opening statement. Respondent submitted an answering statement and complainant submitted a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Agra, Inc., is a corporation whose address is 121 New England Produce Center, Chelsea, Massachusetts. At the time of the transaction alleged in the counterclaim, complainant was licensed under the Act.

2. Respondent, J. A. Wood Co-Vista, Inc., is a corporation whose address P.O. Box 9069, Phoenix, Arizona. At the time of the transaction alleged in the complaint, respondent was licensed under the Act.

3. On or about November 22, 1983, respondent sold to complainant 350 cartons of romaine lettuce at \$5.00 per carton and 70 cartons of green onions at \$5.00 per carton, f.o.b. The total price for the vegetables, including top ice and cooling, was \$2,401.00. The Richard Kaiser Co. Inc., Salinas, California, acted as the broker.

4. The romaine and green onions were loaded on a Century truck at complainant's warehouse in Phoenix. The truck had originated in California, and already contained a load of mixed greens, consisting of green leaf, red leaf, and Boston lettuce, green onions, and daikhon (watercress). The truck then proceeded, in interstate commerce, to complainant's place of business in Chelsea, Massachusetts, where it arrived on November 30, 1983. Upon arrival, complainant unloaded the truck and secured federal inspections of the romaine, and the red and green leaf lettuce and daikhon that had

been loaded in California. The federal inspection of the red and green leaf lettuce and daikhon revealed the following, in relevant part:

VARIOUS CONTAINERS RANGE 29° TO 30°F.

RED LEAF AND GREEN LEAF LETTUCE IN CARTONS,
"MOR GREEN" APPLICANT STATES 42 CARTONS RED
LEAF AND 84 CARTONS GREEN LEAF.

CONDITION:	IN MOST CARTONS SOME TO ALL HEADS ADJACENT TOPS, SIDES, AND/OR BOTTOMS OF CARTONS ARE FROZEN EXTENDING INTO CARTONS FROM APPROXIMATE- LY 1 TO 6 INCHES AFFECTING FROM $\frac{1}{2}$ INCH INTO HEAD TO ENTIRE HEAD AND IS SO LOCAT- ED AS TO INDICATE FREEZING OCCURRED AFTER PACKING BUT NOT IN ITS PRESENT LOCATION.
DAIKHON:	IN WIREBOUND CRATES, "CALIFOR- NIA WATERCRESS INC." APPLI- CANT STATES 25 CRATES.
CONDITION:	IN MANY CRATES FROM SOME TO ALL ROOTS ADJACENT TOPS, SIDES, AND/OR BOTTOMS OF CRATES ARE FROZEN EXTEND- ING INTO CRATE FROM 1 TO 8 INCHES AFFECTING FROM $\frac{1}{2}$ INCH INTO ROOT TO ENTIRE ROOT AND IS SO LOCATED AS TO INDICATE FREEZING OCCURRED AFTER PACKING BUT NOT IN ITS PRESENT LOCATION.
REMARKS.	EACH ABOVE LOT RESTRICTED TO FREEZING ONLY AT APPLICANT'S REQUEST. ROMAINE LETTUCE FROM ABOVE LOT # 157 REPORT- ED ON CERTIFICATE B-75526.

The federal inspection of the romaine (certificate B-75526) found as follows, in relevant part:

VARIOUS CONTAINERS RANGE 34° to 35°F

ROMAINE LETTUCE IN CARTONS "DAVCO" APPLICANT
STATES 350 CARTONS

CONDITION	DECAY RANGES FROM 4 TO 24 PLANTS PER CARTON [17% TO 100%] AVERAGE 55% BACTERIAL SOFT ROT IN VARIOUS STAGES AFFECTING 1 TO 3 OUTER LEAVES.
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5. After the inspections referred to Finding of Fact 6, complainant informed the broker of the inspection results, and the broker notified respondent. Respondent stated that there was a transportation problem, and insisted on payment in full for the romaine.

6. On November 30, 1983, at 3:26 p.m., respondent sent the following telegram to complainant:

WE THE J. A. WOOD COMPANY ARE NOT ACCEPTING YOUR REJECTION ON 350 CARTONS TWO DOZEN ROMAINE LETTUCE SHIPPED 11-22-83 ON CENTURY TRUCK LICENSE NUMBER CALIFORNIA BT08167. THIS SHIPMENT SHIPPED ON FOB BASIS. WE FEEL THE TRANSIT TIMES ON THIS LOAD TO BE EXCESSIVE AND TEMPERATURE ON ARRIVAL TOO COLD. THEREFORE WE EXPECT PAYMENT IN FULL.

Later that same day, at 4:01 p.m., complainant sent the following telegram to respondent:

FROM AGRA INCORPORATED CHELSEA, MASS. ARRIVED THIS DATE 11/30/83 350 CARTONS DAVCO BRAND ROMAINE TOP ICE PRESENT ON TRUCK. FEDERAL INSPECTION READS IN PART 34 TO 35 DEGREES DECAY RANGES FROM 4 TO 24 PLANTS PER CARTON AVERAGE 55 PERCENT SOFT ROT IN VARIOUS STAGES. THIS CONSTITUTES BREACH OF CONTRACT. WE ARE SELLING ROMAINE TO ESTABLISH OUR DAMAGES RESULTING FROM YOUR BREACH OF CONTRACT.

7. Complainant resold some of the romaine and, on December 1983, dumped 44 cartons. On December 16, 1983, complainant sent to respondent a recap of sales and statement of damages, which reads as follows:

Damages over and above invoice [sic] price. Account of sales for romaine are the following:

2 at	12.00	=	24.00
8 at	11.00	=	88.00
3 at	8.00	=	24.00
3 at	7.00	=	21.00
11 at	5.00	=	55.00
13 at	4.00	=	52.00
15 at	2.50	=	37.50
121 at	2.00	=	242.00
30 at	1.00	=	30.00
100 at	.50	=	50.00
44 Dumped			0.00
			<u>\$623.50</u> Gross Sales

Market price of romaine was 11.00. See Market Reporter.

Market Price:	\$3,850.00
Loss,	-\$3,226.50
Invoiced [sic]	<u>\$1,977.50</u>
1,249.00	Damages lost to Market

Therefore, please find attached invoice in the amount of \$1,249.00 due Agra Inc. for J. A. Woods breach of contract regarding the romain.

8. Complainant has paid respondent \$395.50, consisting of \$350.00 for the green onions and \$45.00 for a portion of the cooling charge.

9. To date, respondent has not paid complainant the \$1,221.00 which complainant claims to be due and owing.

10. To date, complainant has not paid respondent the \$2,005.50 which respondent claims in its counterclaim to be due and owing.

11. A formal complaint was filed on July 6, 1984, which was within nine months from when the alleged cause of action herein accrued. A counterclaim concerning the transaction alleged in the complaint was filed on November 9, 1984.

CONCLUSIONS

There is no dispute concerning the 70 cartons of green onions purchased by complainant from respondent. Complainant alleges that the 350 cartons of romaine arrived in very bad condition, in

breach of warranty. Respondent claims that the damage was caused by transportation problems, namely freezing temperatures on board the truck and a two day delay in transit.

Although complainant attempted to reject the romaine, the November 30, 1983, inspection (Finding of Fact 6) shows that the romaine was unloaded after it arrived at complainant's warehouse. The act of unloading constituted acceptance. *Mario Saikhon v. Russell-Ward Company, Inc.*, 34 Agric. Dec. 1940 (1975). Upon accepting the romaine, complainant became liable for its contract price, less damages due to any breach of warranty, which complainant has the burden of proving by a preponderance of the evidence. *Santa Clara Produce, Inc. v. Caruso Produce Inc.*, 41 Agric. Dec. 22749 (1982). As this was an f.o.b. sale, respondent gave the implied warranty of suitable shipping condition, which is defined in the regulations (7 CFR 46.43(j)) as warranting that the commodity, at the time of billing, will be in a condition which, if handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon by the parties. The decisive question in this case is whether there was a breach of such warranty by respondent.

The November 30, 1983, inspection of the romaine shows severe condition problems. Even if respondent's claim of a two day delay in transportation had validity, it would certainly not account for such a high percentage of decay. However, respondent alleges that the romaine was frozen in transit, referring to a November 30, 1983, federal inspection of the green and red leaf lettuce and daikhon unloaded from the same truck. These commodities were apparently loaded on board the truck in California, and the romaine and green onions were added when the truck arrived in Phoenix. Complainant argues that the inspection of the romaine shows acceptable pulp temperatures and no freezing damage. Complainant also states that the green onions revealed no damage from freezing.

The burden is upon complainant, the party seeking to invoke the suitable shipping condition warranty, to prove that transportation conditions were normal. *O. P. Murphy Produce Co., Inc. a/t/a O. P. Murphy & Sons v. Kelvin S. Ng d/b/a Kin Yip Company*, 31 Agric. Dec. 772 (1982). The November 30, 1983, inspection of the green and red leaf lettuce and daikhon (Finding of Fact 6) shows clearly that there was freezing in transit on board the truck. Even though the inspection of the romaine reveals no evidence of freezing, it is quite possible that the romaine froze during transit and thawed before the inspection took place. If this occurred, it is quite likely that rapid deterioration would ensue. As it is undeniable that transportation conditions were abnormal on board the truck, it is complain-

ant's burden to show that the romaine was unaffected by such conditions. However, complainant has provided no evidence, such as the tape of a temperature recorder, to prove that the freezing conditions which affected the green and red leaf lettuce and daikhon did not affect the romaine as well. Therefore, on the basis of the evidence in the record, we are compelled to conclude that complainant has failed to sustain its burden of proving the existence of normal transportation conditions. It is our conclusion that transportation conditions were not normal, thereby voiding the suitable shipping condition warranty.

In the absence of any breach of warranty, complainant became liable for the entire contract price of the accepted romaine. There is thus no merit to the complaint, and it must be dismissed. Respondent's counterclaim seeks the difference between the \$2,401.00 contract price for the romaine and green onions, and the \$395.50 already paid, or \$2,005.50. This claim has merit and will be granted. Complainant's failure to pay respondent \$2,005.50 is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

The complaint is hereby dismissed.

Within 30 days from the date of this order, complainant shall pay to respondent, as reparation, \$2,005.50, with interest thereon at the rate of 18 percent per annum from January 1, 1984, until paid.

Copies of this order shall be served upon the parties.

BATTAGLIA PRODUCE SALES, INC. *v.* A. J. SALES COMPANY. PACA
Docket No. 2-6740. Decided July 24, 1985.

Acceptance of commodity—Inspection—Reparation awarded.

Edward M. Silverstein, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$1,597.50 in con-

nection with a transaction, in interstate commerce, involving cabbage, a perishable agricultural commodity.

A copy of the Department's report of investigation was served on both parties. Respondent also was served with a copy of the complaint, and filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages did not exceed \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file further evidence by way of sworn statements, but neither of them did so. Also, neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Battaglia Produce Sales, Inc., is a corporation whose address is 1705 Weeksville Road, Elizabeth City, North Carolina 27909.
2. Respondent, A. J. Sales Company, is a corporation whose mailing address is Box 7798, Orlando, Florida 32854. At all material times, the respondent was licensed under the Act.

3. On or about April 23, 1984, the complainant by oral contract sold 1,065 sacks of cabbage to respondent for a delivered price of \$9.25 plus \$22.50 for a Ryan temperature recorder, for a total delivered price of \$9,873.75. The parties agreed that sacks were to contain 16 to 18 cabbages each. The size was negotiated between the parties as respondent had wanted to order larger cabbages (8-14 heads per sack), but such sizes were unavailable in the United States due to severe weather conditions in the growing areas. However, the complainant was able to purchase 14-16 size cabbages on April 23, 1984, from J.S. McManus Produce P.O. Box 568, Weslaco, Texas 78596, which had purchased them from Russell Produce, Inc., P.O. Box 1536, McAllen, Texas 78501. The sacks in which the cabbages were packed were marked "Russell's Pride." The cabbage was loaded on board a truck on April 24, 1984, and was delivered to Blue Ridge Farms, Atlantic Avenue, Brooklyn, New York, which was a customer of Dublin Produce Company, also of Brooklyn, New York, on April 30, 1984. Dublin Produce Company was respondent's customer.

4. On May 1, 1984, a load of cabbage was inspected at the location of Blue Ridge Farms. The "Abridged Report of Fresh Fruit and Vegetable Inspection" certificate issued thereafter, No.

72237,¹ indicates that the cabbage was in bags marked "New Cabbage 50 pounds", that the applicant stated there were 1,065 sacks, and that the weight of the cabbages were "Generally 1½ to 3 and ½ pounds average 1 percent under 1½ pounds." The cabbage graded U.S. No. 1. The report further indicates that the cabbage had been unloaded off of a truck with Georgia license No. DL 2572. The truck which carried the cabbage loaded from Russell Produce Co., in McAllen, Texas and transported to Blue Ridge Farms in Brooklyn, New York, carried this license number.

5. The Complaint was filed on October 16, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The issue in this proceeding focuses on the size of the cabbages which were delivered to the respondent's customer. The parties agree that the cabbages which were purchased by the respondent were to be size 16 to 18. In other words, each sack of cabbages was to contain no less than 16 nor more than 18 heads. Respondent alleges that the cabbages which were received by its customer contained 15 to 30 heads per sack. However, the respondent has provided no probative evidence of this fact. The only evidence which was submitted by it and which it claims goes to this question is the May 1, 1984, Abridged Inspection certificate. However, although the respondent's customer could have asked the inspector to report the head count it did not and the inspection certificate does not indicate the head count of the cabbages. True, it does indicate that the heads of cabbages generally weighed between 1½ to 3½ pounds each, but this does not indicate, contrary to respondent's assertion, that the cabbages which were inspected did not substantially comply with the contract terms. The information on the inspection certificate is just not sufficient for us to conclude that the cabbages which were inspected were not substantially in the 16 to 18 size range. The respondent's customer should have requested that the inspector make a count of the heads of cabbages in the sacks. Only the reporting of such information would have allowed us to conclude that the complainant failed to meet the requirements of the parties' contract.

In any event, the respondent's customer unloaded the cabbages off the truck, and therefore the respondent must be concluded to have accepted them. *Bilroy's Farm v. Ruby Produce*, 30 Agric. Dec. 004 (1971). Its customer having accepted the cabbages on respondent's behalf, respondent was obligated to the complainant for the

¹ This corrected certificate superseded certificate No. B 69465.

full contract price less any damages resulting from a breach of contract committed by the complainant. *Rocky Ford Dist. Co. v. Angel Produce*, 29 Agric. Dec. 93 (1970). The respondent has the burden of proof as to such matters. *The Growers-Shipper Pot. Co. v. Southw. Pro. Co.*, 28 Agric. Dec. 511 (1969). Even assuming that the respondent had proven that the complainant had breached their contract, the respondent has submitted absolutely no evidence which would show that it was damaged by such a breach. In view of this, we have to rule that the respondent is still obligated to the complainant for the full contract price. *Dilatash v. Sacks Bros.*, 20 Agric. Dec. 626 (1961).

The full contract price was \$9,873.75. Of this amount, the respondent has paid complainant \$8,276.25. This leaves a balance due to complainant of \$1,597.50. Respondent's failure to pay the complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within thirty days from the date of this order, respondent shall pay complainant \$1,597.50 plus interest in the amount of 13 percent per annum from June 1, 1984, until paid.

Copies of this order shall be served on the parties.

C & E ENTERPRISES, INC. a/t/a KOYAMA FARMS v. EDWARD G. RAHLL & SONS, INC. PACA Docket No. 2-6634. Decided August 12, 1985.

Burden of proof on moving party—Disposition of goods necessary to prove damages—Duty to communicate rejection.

Where receiver rejected goods because they did not conform to contract, it did not have the duty to notify shipper directly when it did not know who shipper was. Shipper could not prove damages because it did not show ultimate disposition of the lettuce.

Thomas C. Heinz, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$2,470.00 in con-

nection with the sale and shipment of a trucklot of lettuce in inter-state commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered a part of the evidence, as are the verified complaint and answer. The parties were given opportunities to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement and a brief, and respondent submitted an answering statement but no brief.

FINDINGS OF FACT

1. Complainant, C & E Enterprises, Inc., is a corporation also trading as Koyama Farms with a mailing address at P.O. Box 7266, Guadalupe, California 93434.

2. Respondent, Edward G. Rahll & Sons, Inc., is a corporation with an address at Unit 36-42, Maryland Wholesale Produce Market, Jessup, Maryland 20794. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On August 20, 1983, respondent contracted with Texas Produce Brokers, a brokerage house located at Dallas, Texas, to receive 200 to 300 cartons of lettuce on a consignment basis.

4. The lettuce arrived at respondent's place of business on August 25, 1983. The truck driver presented a bill of lading which indicated respondent was to receive 650 carton of lettuce, rather than 200 to 300 cartons, whereupon Thomas E. Rahll, vice-president of respondent, telephoned Texas Produce Brokers and objected to receipt of more than the contract amount. The representative of Texas Produce Brokers said respondent must take all 650 cartons or none. Respondent refused to accept any of the lettuce.

5. On August 25, 1983, Texas Produce Brokers, requested and received a federal inspection of the lettuce in a truck trailer located at respondent's place of business. At the time of inspection the lettuce graded U.S. #1.

6. At no time during the period in question did representatives of complainant and respondent have direct contact with one another.

7. On August 22, 1983, complainant sent an invoice to respondent for 650 cartons of lettuce at \$3.15 per carton plus \$.65 per carton pooling, for a total F.O.B. contract price of \$2,470.00. On the face of

the invoice respondent wrote, "We did not receive this shipment," and returned it to complainant.

8. Respondent has not paid complainant any part of the \$2,470.00 invoiced to respondent on August 22, 1983.

CONCLUSIONS

As the moving party, complainant has the burden of proving by a preponderance of evidence the terms of the contract, respondent's breach of such contract, and the resulting damages, if any, sustained by complainant. *Justice v. Milford Packing Co.*, 34 Agric. Dec. 533, and cases cited at 535 (1975). Complainant has not met that burden.

Complainant contends respondent agreed with Texas Produce Brokers to purchase 650 cartons of complainant's lettuce, but rejected it after unloading part of the shipment, purportedly for quality reasons. Since complainant had no direct contact with respondent, complainant relies entirely upon that version of the facts revealed in the undated letter submitted for the record by Texas Produce Brokers. That letter states in part: "650 cartons of lettuce were sold to Rahll & Sons, Inc., Baltimore, Maryland on an FOB basis. Upon arrival of the load it was partially unloaded by Rahll and they said it was bad. We had an inspection done on the lettuce and it was graded U.S. No. 1, they still refused the lettuce and instructed the driver to leave." However, we do not believe the allegations contained in this letter accurately reflect the facts of this case, for the following reasons:

The broker's confirmation of purchase and sale attached to the letter supposedly evidences the transaction in dispute, but on its face the confirmation concerns a transaction negotiated on a different date at a different price. It is dated August 19, 1983, not August 20, 1983, with a contract price of \$6.00/carton F.O.B., plus 70¢/carton for cooling, whereas complainant claims respondent agreed to pay \$3.15/carton, plus 65¢/carton for cooling.

Respondent vigorously denies responsibility for unloading any part of the lettuce shipment, agreeing to accept 650 cartons or refusing it for quality reasons. Instead, representatives of respondent convincingly state that the contract was for 200 to 300 cartons on a consignment basis, and that the shipment was rejected for quantity, not quality, reasons. There is no indication respondent knew who the shipper was when the goods arrived. Therefore, rejection was properly communicated to Texas Produce Brokers when the shipment arrived, a fact confirmed by the broker's letter quoted above, although the letter cites a different reason for the rejection. We also credit the sworn statement of respondent's vice-president

to the effect that the broker maintained dominion over the entire load throughout the shipment, and that the truck driver left respondent's premises with the lettuce upon instructions from the broker.

Complainant complains that "at no time did complainant ever receive a protest of its invoice from respondent nor receive a protest from the broker in regards to confirmation of sale," and again, "up to September 30, 1983 I had never once heard, either directly or through the broker, that Edward G. Rahll & Sons, Inc. had no intentions of paying for this invoice." Although respondent in fact did protest complainant's invoice by returning it with the notation, "We did not receive this shipment," it is not clear exactly when the invoice was returned. Since respondent communicated rejection to the broker immediately upon arrival of the shipment, it is immaterial precisely when the invoice was returned. Respondent is not responsible for the broker's failure to relay that rejection to complainant. Nor was respondent under any duty to communicate rejection directly to complainant under circumstances where it did not know who shipped the goods.

In short, respondent had reasonable cause to reject delivery of the lettuce because it did not conform to the quantity term of the contract, and respondent also properly and seasonably communicated rejection to Texas Produce Brokers.

Since complainant has not sustained its burden of proving the contract terms and respondent's breach thereof, we are not required to reach the issue of damages. It should be noted, however, that the record reveals no evidence to show the ultimate disposition of the disputed lettuce. Without such proof, complainant could not have recovered the claimed full price in damages even if it had prevailed on the merits. *Delcor Fruit Sales v. New England Citrus Bowl, Inc.*, 30 Agric. Dec. 1376 (1971).

ORDER

The complaint is hereby dismissed.

Copies shall be served upon the parties.

SAM WANG FOOD CORPORATION v. MAILLEY QUALITY PRODUCE COMPANY, PACA Docket No. 2-6670. Decided August 12, 1985.

Jurisdiction—Reparation awarded.

George S. Whitten, Presiding Officer.

Bernard C. Dietz, Washington, D.C., for complainant

Nathan Wasser, McLean, Virginia, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$20,204.00 in connection with the sale in interstate commerce of numerous lots of mixed produce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

Although the amount claimed in the formal complaint exceeds \$15,000.00, the parties waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. However, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Sam Wang Food Corporation, is a corporation whose address is 1258 Fifth Street, N.E., Washington, D. C.

2. Respondent, Mailley Quality Produce Company, is a corporation whose address is 1350 V Street, N.E., Washington, D. C. At the time of the transactions involved herein respondent was licensed under the Act.

3. Between March 7, 1984, and May 5, 1985, complainant sold to respondent numerous lots of mixed produce received by complainant from outside of the District of Columbia, and having a total value of \$20,204.00. Respondent accepted all of the produce and has not paid complainant any part of the purchase price thereof.

4. The formal complaint was filed on July 10, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Neither party to this proceeding submitted any evidence in support of their respective contentions beyond that contained in the pleadings and the exhibits attached to the complaint. The complaint is in affidavit form, and was made by the president of the complainant corporation. Such complaint states that numerous items of mixed produce were sold to respondent over the period of March 1 through May 5, 1984, having a total value of \$20,204.00. Complainant states that such commodities were "made available for shipment on successive dates during the subject period, from a point in the District of Columbia, to the respondent at Merrifield, Virginia. . ." The complaint additionally alleges that respondent accepted the produce and has not paid the purchase price. Attached to the complaint are numerous invoices for the produce made out to Mailley Produce, each of which is signed and initialed at or near the bottom.

Paragraph 4 of the complaint alleges the sale of the mixed produce to respondent by complainant in the course of interstate commerce. Respondent denied paragraph 4 only "so far as it concerned themselves with purported interstate transactions between the parties". Further, in reference to paragraph 4, respondent admitted "that it transacted business with Complainant, exclusively intrastate but denies the amount stated as agreed upon. In addition, in a later paragraph of the answer respondent denied that it ever transacted business from a location in Merrifield, Virginia.

Paragraph 10 of the complaint alleges that the exhibits, consisting of the various signed invoices, are true copies of original papers relating to the matters involved in the complaint. Respondent's answer to this allegation was to "neither admit nor deny the allegations contained in Paragraph 10." The Rules of Practice (7 CFR § 47.8(b)) require that an "answer shall contain (1) a precise statement of the facts which constitute the grounds of defense, (2) shall specifically admit, deny or explain each of the allegations in the complaint, unless respondent is without knowledge, in which case the answer shall so state; . . ." In this case we are forced to view the answer and complaint, not merely as pleadings, but as evidentiary submissions. Viewing them as such, we have concluded, that complainant has proven by a preponderance of the evidence that it sold mixed produce, purchased in interstate commerce, to respondent in the total amount of \$20,204.00, and that respondent accepted such produce, and has not paid complainant the sum of \$20,204.00 is a violation of section 2 of the Act for which respondent should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$20,204.00, with interest thereon at the rate of 13 percent per annum from June 1, 1984, until paid.

Copies of this order shall be served upon the parties.

PAT BROKERAGE CO. OF CALIFORNIA v. QUAKER CITY PRODUCE COMPANY. PACA Docket No. 2-6656. Decided August 14, 1985.

F.O.B. sale—Reparation awarded.

Peter Train, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$4,102.92 in connection with the sale of strawberries in interstate commerce.

A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondent. A copy of the report of investigation was served upon complainant.

Respondent filed an answer in which it denied liability. Respondent admitted the purchase of the strawberries, but alleged that two of the four containers of strawberries did not arrive at destination in suitable condition nor at the time specified by the contract.

Since the amount claimed in damages does not exceed \$15,000.00, the shortened procedure provided for in section 47.20 of the Rules of Practice (7 CFR § 47.20) applies. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements. Complainant filed an opening statement in the form of additional affidavits to which respondent filed an answering statement. Complainant replied to respondent's answering statement. Both parties declined an opportunity to file briefs.

FINDINGS OF FACT

1. Complainant PAT Brokerage Co. of California, Inc., herein after referred to as complainant, was at all times material herein a corporation whose mailing address was P.O. Box 4398, Salinas,

California 93912. Complainant now operates under the name PAT Distributing Co. of California, Inc. at the same address.

2. Respondent Quaker City Produce Company, hereinafter referred to as respondent, is a corporation whose mailing address is 3300 Galloway Street, Philadelphia, Pennsylvania 19148.

3. Both parties are, and at the time of the transaction involved herein were, licensed under the Act.

4. On July 30, 1983, in the course of interstate commerce, complainant orally contracted to sell to respondent 760 flats of strawberries at a per flat price of \$8.00 plus \$.60 for cooling, \$.15 for brokerage, and \$.30 delivery to the San Francisco Airport. Additionally there was a charge of \$1,404.50 for air freight from San Francisco to the Newark, New Jersey airport. The total contract price was \$8,282.80.

5. The strawberries were trucked from Watsonville, California to San Francisco airport where they were to be flown to Newark, New Jersey in four containers via Continental Airlines. Two containers arrived in Newark on August 1, 1983 without problems, but the remaining two containers were inexplicably taken off the plane in Denver, Colorado where they remained for approximately 24 hours without refrigeration before being shipped to Newark.

6. A federal inspection of the two containers arriving late was made in Philadelphia, Pennsylvania upon arrival on August 2, 1983. The inspection revealed Rhizopus Rot and Gray Mold Rot in various stages. Decay averaged 41% for one container and 52% for the other. The temperature of the strawberries ranged in various locations from 74° to 84°F for one container and 59° to 83°F for the other.

7. T.G.T. Inc. is a broker which, serving as agent for respondent, prepared a confirmation of sale and invoice which stated, in pertinent part, that the price was \$8.00 F.O.B. plus charges for cooling, brokerage, and freight.

On August 8, 1983, complainant invoiced respondent for the ~~760~~ of strawberries including freight and brokerage in the amount of \$8,282.80.

Respondent has remitted \$4,179.88 calculated as follows:
+1- two containers arriving timely and \$38.48 as the
+1- two containers of spoiled strawberries.

Complaint was filed on July 6, 1984. The informal hearing was held on February 21, 1984, which was within nine months of the date herein accrued.

CONCLUSIONS

This case involves a dispute over whether this was a F.O.B. shipment contract. It is clear that the strawberries did not meet the contract specifications at destination. It is equally clear that the spoilage was caused by the delay in transportation by Continental Airlines and the fact that the strawberries were not kept refrigerated during the period of delay. The temperature of the strawberries ranged to as high as 84°F. Shipping conditions were obviously abnormal.

The question is who must bear the responsibility for the loss. Complainant claims that this was an F.O.B. contract. In an F.O.B. contract, the buyer (respondent herein) assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed (7 CFR § 46.43(i)). Respondent however, claims that the contract called for a delivered sale. It paid \$4,141.40 for the two containers which made good delivery. It also remitted \$38.48 as the net proceeds from the resale of the other two containers claiming that it resold their contents for the account of complainant. If this transaction were a "delivered" or "delivered sale" contract the seller must deliver the produce at buyer's market or at the agreed upon location free of any and all charges for transportation or protective service. The seller assumes all risks of loss and damage in transit not caused by the buyer. (7 CFR § 46.43(p)).

The damage to the strawberries was caused in transit by Continental Airlines, not the seller or the buyer. The party assuming the risk of damage in transit must, therefore, bear the loss.

A review of the evidence demonstrates that this was an F.O.B. contract. The broker's memorandum stated that the price per flat was \$8.00 F.O.B. The broker's statement contained in the Report of Investigation reaffirms that this was an F.O.B. transaction. Furthermore, respondent's action in paying the freight charges connected with the shipment of the two containers arriving in a timely manner is inconsistent with an argument that this was a "delivered sale". In such a transaction the buyer, as noted above, generally pays no transportation charges. It must be concluded, therefore, that this was an F.O.B. transaction.

In an F.O.B. transaction, the seller is obligated to place the produce free on board shipping point in suitable shipping condition which is defined as a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination (7 CFR § 46.43(j)). Clearly, a 24 hour delay without refrigeration is not normal transportation service and conditions. This risk of the delay is assumed by the buyer (respondent herein) in a F.O.B.

transaction. Respondent is, therefore, liable to pay the entire contract price or \$8,282.80. It has remitted only \$4,179.88, leaving a deficiency of \$4,102.92.

The failure of respondent to pay this amount to complainant is a violation of section 2 of the Act. Reparation should be awarded to complainant in the amount of \$2,102.92, with interest.

ORDER

Within 30 days of the date of this order, respondent shall pay to complainant, as reparation, \$4,102.92, with interest thereon at the rate of 13 percent per annum from September 1, 1983, until paid.

Copies hereof shall be served upon the parties.

J. A. Wood Co.-VISTA, INC. a/t/a J. A. Wood Co. v. HFP Sysco Food SERVICES and/or TAYLOR BROKERAGE COMPANY, INC. PACA Docket No. 2-6696. Decided August 14, 1985.

Market protection—Reparation awarded.

George S. Whitten, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Respondents, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondents in the amount of \$400.00 in connection with the shipment in interstate commerce of 400 cartons of lettuce.

A copy of the report of investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondents. Respondent HFP Sysco Food Services defaulted in the filing of an answer. Respondent Taylor Brokerage Company, Inc., filed an answer denying any liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given

an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and respondent filed an answering statement. Both parties filed briefs.

FINDINGS OF FACT

1. Complainant, J. A. Wood Co-Vista, Inc., is a corporation also trading as J. A. Wood Co., whose address is P.O. Box 9069, Phoenix, Arizona.

2. Respondent, HFP Sysco Food Services, is a corporation whose address is P.O. Box 113, Harrisonburg, Virginia. At the time of the transaction involved herein this respondent was licensed under the Act.

3. Respondent, Taylor Brokerage Company, Inc., is a corporation whose address is P.O. Box 1012, Sharpsburg, North Carolina. At the time of the transaction involved herein this respondent was licensed under the Act.

4. On or about October 24, 1983, complainant sold to respondent HFP Sysco Food Services through respondent Taylor Brokerage Company, Inc., acting as broker, one partial truckload of lettuce consisting of 400 cartons at \$8.00 per carton, plus \$.70 per carton for cooling, \$11.25 for a Ryan temperature recorder, and \$100 for brokerage, with the stipulation that complainant would grant market protection through Wednesday, October 26, 1983.

5. On October 24, 1983, complainant shipped 400 cartons of lettuce from loading point in North Carolina to respondent HFP Sysco Food Services, in Harrisonburg, Virginia.

6. On Tuesday, October 25, 1983, complainant's Eve Brunelle agreed in discussions with Kit Taylor of respondent Taylor Brokerage Company, Inc., to a reduction in price to \$6.00 per carton based on market decline.

7. On November 8, 1983, respondent HFP Sysco Food Services, Inc., sent complainant a check for \$1,991.25 based on a \$4.00 per carton f.o.b. price. Complainant's Eve Brunelle contacted Kit Taylor and they agreed to payment on the basis of \$5.00 f.o.b. The check was then returned to respondent HFP Sysco Food Services along with an invoice for \$2,391.25 based on the \$5.00 f.o.b. price. Respondent HFP Sysco Food Service returned the \$1,991.25 check to complainant, and later released such check as an undisputed amount in this proceeding.

8. In the informal complaint against respondent HFP Sysco Food Services was filed on February 28, 1984, which was within nine months after the cause of action relative thereto accrued. The informal complaint against respondent Taylor Brokerage Company,

Inc., was filed on July 20, 1984, which was within nine months after the cause of action relative thereto accrued.

CONCLUSIONS

Respondent HFP Sysco Food Services did not file an answer to the complaint, and is considered to be in default. However, respondent Taylor Brokerage Company, Inc., has stated on several occasions during the course of this proceeding that respondent HFP Sysco Food Services should not be involved, and that respondent Taylor Brokerage Company, Inc. is taking full responsibility.

Complainant and respondent Taylor agree that the lettuce was sold with the stipulation that market protection would be granted through Wednesday, October 26, 1983. However, there is little agreement between these parties as to anything else. Complainant maintains that the original price was \$8.00 per carton, f.o.b., whereas respondent Taylor maintains that the original price was \$6.00 per carton, f.o.b. Respondent Taylor states that October 26, 1983, Eve Brunelle agreed to a reduction in price to \$4.00 per carton, f.o.b., based on market decline. Eve Brunelle states that she agreed on Tuesday, October 25, 1983, to a reduction in price from \$8.00 per carton to \$6.00 per carton, f.o.b., and that there were no further communications between the parties until complainant received a remittance on the basis of \$4.00 per carton. Both parties' positions were supported by sworn affidavits by the persons involved in the negotiations. Respondent Taylor maintains that following the conversation on October 26, 1983, it mailed a broker's confirmation of sale to complainant reflecting the changed price to \$4.00 per carton. Numerous copies of this broker's memorandum of sale were submitted during the course of this proceeding. However, complainant denies receipt of this memorandum of sale at any time prior to its receipt of the check dated November 8, 1983, to which complainant alleges the broker's confirmation was attached. The record contains no copy of any broker's memorandum of sale relative to the original contract between the parties. The record does, however, contain a copy of complainant's original invoice showing a \$6.00 f.o.b. price. In addition the record contains a copy of complainant's corrected invoice dated Nov. 28, 1983, showing the price change to \$5.00 f.o.b. on the basis of the negotiations which took place in November. Although the issue is a close one we have decided that complainant has proven its version of the facts by preponderance of the evidence.

Respondent Taylor has claimed responsibility for any amount that might be found due herein to complainant. It appears that respondent Taylor entered into the last agreement for the \$5.00 f.o.b.

price without consultation with respondent HFP Sysco Food Services. Accordingly, we find that the liability for the \$1.00 per carton additional price, or \$400, is respondent Taylor's. Respondent Taylor's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest. The complaint against respondent HFP Sysco Food Services should be dismissed.

ORDER

Within thirty (30) days from the date of this order, respondent Taylor Brokerage Company, Inc., shall pay to complainant, as reparation, \$400 with interest thereon at the rate of 13 percent per annum from December 1, 1983, until paid.

The complaint against respondent HFP Sysco Food Services is dismissed.

Copies of this order shall be served upon the parties.

RIGBY PRODUCE v. GARY WATKINS PRODUCE CO., INC., and/or STEPHEN J. WIEDENBAKER d/b/a STEVE'S BROKERAGE. PACA Docket No. 2-6713. Decided August 14, 1985.

Payment party disputed—Reparation awarded.

George S. Whitten, Presiding Officer.

William B. Schaeffer, Houston, Texas, for respondent Gary Watkins Produce Co., Inc.

Respondent Stephen J. Weidenbaker d/b/a Steve's Brokerage, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondents in the amount of \$4,500 in connection with the sale in interstate commerce of a truckload of potatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondents. Respondent Gary Watkins Produce Co., Inc., filed an answer thereto denying liability to complainant. Respondent Stephen J. Weidenbaker defaulted in the filing of an answer.

The amount claimed in the formal complaint does not exceed \$15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Rigby Produce, is a partnership composed of Lynn Mickelsen, Dale Mickelsen, and J. C. Steel, whose address is P.O. Box 628, Rigby, Idaho.
2. Respondent, Gary Watkins Produce Co., Inc. (hereinafter Watkins), is a corporation whose address is 3169 Produce Row, Houston, Texas. At the time of the transaction involved herein this respondent was licensed under the Act.
3. Respondent Stephen J. Weidenbaker (hereafter Weidenbaker), is an individual doing business as Steve's Brokerage, whose address is 20134 Lions Gate Drive, Humble, Texas. At the time of the transaction involved herein this respondent was licensed under the Act.
4. On or about May 2, 1984, complainant sold to respondent Watkins, through respondent Weidenbaker acting as broker, one truck-load of Idaho Russett potatoes consisting of 225 100-pound sacks of U.S. No. 1. potatoes at \$20 per hundredweight, or a total of \$4,500, f.o.b.
5. On or about May 3, 1984, complainant shipped the potatoes to respondent Watkins in Houston, Texas. The potatoes were accepted by respondent Watkins on arrival. On May 3, 1984, complainant invoiced respondent Watkins for the potatoes.
6. On May 21, 1984, respondent Watkins paid respondent Weidenbaker for the potatoes. Neither respondent has paid complainant.
7. The formal complaint was filed on September 7, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant seeks to recover the purchase price in the amount of \$4,500 for a load of potatoes sold to respondent Watkins. Respondent Watkins admits acceptance of the potatoes, but states that it purchased the potatoes from Weidenbaker. It also claims it had no contact with, nor did it enter into, any kind of agreement with complainant. Respondent Watkins submitted a copy of an in-

voice from Weidenbaker which was undated. This invoice did not disclose that complainant was the seller. However, respondent Watkins also submitted a copy of a confirmation of sale issued by respondent Weidenbaker, dated May 2, 1984, which states that it was "issued to Rigby Produce" and further has written at the bottom "Steve's to Collect & Remit". If this were the full extent of the relevant evidence we might be justified in finding that respondent Watkins was correct in making its payment to respondent Weidenbaker. However, the record also contains a copy of an invoice dated May 3, 1984, from complainant to respondent Watkins requesting direct payment of complainant. Respondent Watkins did not deny receipt of this invoice. Since the payment by Watkins to Weidenbaker was made by check dated May 21, 1984, it is evident that respondent Watkins had complainant's invoice in its possession prior to making the payment to Weidenbaker. Respondent Watkins was thus put on notice of complainant's desire that payment be made directly to complainant, and therefore should have inquired as to the broker's authority to collect prior to making any payment to the broker. See *John Manning and Co., Inc. v. Bass and Swaggerty, and/or Gerald F. Covington*, 34 Agric. Dec. 1036 (1975). Respondent Watkins' failure to pay complainant the \$4,500 purchase price of the potatoes is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

With respect to respondent Weidenbaker the evidence before us clearly indicates that such respondent did, in fact, receive the payment for the potatoes shipped by complainant and has failed to remit said funds. Respondent Weidenbaker's failure to remit to complainant the \$4,500 received from respondent Watkins is a violation of section 2 of the Act for which reparation should be awarded with interest.

ORDER

Within thirty (30) days from the date of this order, respondent Gary Watkins Produce Co., Inc., and respondent Stephen J. Weidenbaker d/b/a Steve's Brokerage shall pay to complainant, jointly and severally, as reparation, \$4,500 with interest thereon at the rate of 13 percent per annum from June 1, 1984, until paid.

Copies of this order shall be served upon the parties.

CARL A. MEYER d/b/a CARL A. MEYER AND SONS v. KLINE'S SNACK FOODS, INC. PACA Docket No. 2-6830. Decided August 19, 1988

Admission of indebtedness.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$14,172.30 in connection with a shipment of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. However, respondent alleged that it had recently made partial payment in the amount of \$5,000.00. Complainant was sent a letter giving an opportunity to show cause why an order should not be issued in its favor for \$9,172.30, rather than the \$14,172.30 alleged in the complaint. Complainant did not respond to this letter. Accordingly, the issuance of an order with further procedure awarding reparation to complainant in the amount of \$9,172.30 is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Carl A. Meyer d/b/a Carl A. Meyer & Sons, is an individual whose address is 359 E. Munger Road, Munger, Michigan 48747. Respondent, Kline's Snack Foods, Inc., is a corporation whose address is P.O. Box 189, Central Avenue, Bolivar, Ohio 44612. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as the findings of fact of this order, except that respondent's liability is \$9,172.30 rather than \$14,172.30. On the basis of these facts, we conclude that the actions of respondent are in violation of section 47 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$9,172.30. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$9,172.30, with interest thereon at the rate of 13 percent per annum from May 1, 1984, until paid.

Copies of this order shall be served upon the parties.

TRANS WEST FRUIT CO., INC. v. WEST COAST PRODUCE SALES, INC.
PACA Docket No. 2-6852. Decided August 19, 1985.

Admission of indebtedness.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$11,903.25 in connection with three shipment of lemons in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Trans West Fruit Co., Inc. is a corporation whose mailing address is P.O. Box 3080, Baca Raton, Florida 33431-0980. Respondent West Coast Produces Sales, Inc., is a corporation whose mailing address is P.O. Box 3072, Visalia, California 93278. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$11,903.25. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$11,903.25, with interest thereon at the rate of 13 percent per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

BLUE GOOSE GROWERS, INC., a/t/a DOLE CITRUS v. WEST COAST PRODUCE SALES, INC. PACA Docket No. 2-6854. Decided August 19, 1985.

Admission of indebtedness.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$59,866.85 in connection with shipment of citrus in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Blue Goose Growers, Inc. is a corporation a/t/a Dole Citrus whose mailing address is P.O. Box 3080, Boca Raton Florida 33431-0980. Respondent, West Coast Produce Sales, Inc., is a corporation whose mailing address is P.O. Box 3072, Visalia, California 93278. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$59,866.85. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$59,866.85, with interest thereon at the rate of 13 percent per annum from November 1, 1984, until paid.

Copies of this order shall be served upon the parties.

FRESH WESTERN MARKETING, INC. v. THE FOREST CITY-WEINGART PRODUCE Co. PACA Docket No. 2-6661. Decided August 22, 1985.

Balance of purchase price—Incomplete inspection—Reparation awarded.

George S. Whitten, Presiding Officer.

Matthew M. McInerney, Newport Beach, California, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award against respondent in the amount of \$781.00 in connection with the shipment in interstate commerce of a truckload of lettuce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and respondent filed an answering statement. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Fresh Western Marketing, Inc., is a corporation, whose address is P.O. Box 5275, Salinas, California.

2. Respondent, The Forest City-Weingart Pro. Co., is a partnership consisting of Bernard A. Weingart, Morton W. Weingart, and Sidney H. Weingart, whose address is Northern Ohio Food Terminal, stalls 21-23, Cleveland, Ohio. At the time of the transaction involved herein the respondent was licensed under the Act.

3. On or about March 23, 1984, complainant sold to respondent 781 cartons of lettuce at \$3.50 per carton, plus \$.75 per carton for cooling and racks, and \$22.50 for a temperature recorder, for a total price of \$8,341.75 f.o.b.

4. On March 24, 1984, respondent shipped the lettuce from loading point in Huron, California, to complainant in Cleveland, Ohio.

The lettuce arrived at respondent's place of business the morning of March 29, 1984, and was federally inspected at 11:30 a.m. on that date, while stacked on pallets in respondent's cooler. The inspection covered 500 cartons of the lettuce, and showed that product temperature ranged in various cartons from 44 to 48°F. The quality was shown as: "Clean, fairly well trimmed and green color. 100% Hard or firm. Grade defects average 1%, consisting of broken mid-ribs." The condition of the lettuce was stated to be as follows:

Heads or portion of heads not affected by condition defects are fresh and crisp. *Wrapper leaves*: No decay. *Head leaves*: Damage by Russett Spotting ranges from 2 to 5 heads, in most cartons, in many none, average 8%. Decay in most cartons none, in many ranges from 1 to 7 heads per carton, average 6%, Bacterial Soft Rot, mostly in advanced stages, many in early stages, affecting 1 to 4 outer leaves.

5. The tape from the temperature recorder showed a beginning time of 2:00 p.m. on March 24, 1984. The trace on the tape started at about the fifth hour at approximately 72°F., rose immediately to approximately 100°F. at the sixth hour, and dropped almost vertically to approximately 36°F. at the twelfth hour. The trace continued at approximately 34 to 35°F. until about the twenty-second hour where it began a gradual rise to approximately 42°F. at about the twenty-sixth hour. From the twenty-sixth hour to the thirty-sixth hour the trace gradually declined to approximately 35°F where it continued until the tape ran out at approximately the 108th hour.

6. Respondent has paid complainant \$2,560.75, leaving a balance due on the purchase price of \$781.00.

7. The formal complaint was filed on July 23, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant seeks to recover the balance of the purchase price for the 781 cartons of lettuce accepted by respondent. Respondent maintains that the lettuce was defective, and that it is justified in having taken a \$1.00 per carton allowance.

In its answer respondent's Morton Weingart stated that "we were lead to believe we were buying U.S. No. 1." This is the only place in the record where respondent made any mention of having thought it was purchasing U.S. No. 1 lettuce. When respondent answered the initial inquiry from the Fruit and Vegetable Division it made no mention of this contention. None of the documentation supports the lettuce having been sold as U.S. No. 1. On the basis of

all of the evidence herein, we conclude that respondent purchased no grade lettuce.

Although the temperature during transit was very high for a period of about seven hours, we do not need to determine whether transporation conditions were such as to void the warranty of suitable shipping condition. The federal inspection taken shortly after arrival of the lettuce shows that the lettuce contained 1% more decay than is allowed by the good delivery standards (see 7 CFR § 46.44(a)(2)). However, the federal inspection covered only 500 of the original 781 cartons of lettuce. Respondent gave no explanation as to why the remaining cartons of lettuce were not inspected. It is entirely possible that the cartons of lettuce which were not subject to the federal inspection contained significantly less condition defects than the 500 cartons that were inspected. On this basis, we are unable to conclude that respondent met its burden of proving by a preponderance of the evidence that the total load of 781 cartons of lettuce failed to make good delivery. In addition, we note that even had respondent proved a breach of contract on the part of complainant, respondent did not furnish us with an accounting covering the resale of the lettuce. Consequently, the record does not contain sufficient information upon which we could compute damages in favor of respondent. See *Genbroker Corp. v. Super Food Services*, 38 Agric. Dec. 83 (1979).

Since respondent accepted the lettuce by unloading it from the truck, and has not proved a breach of contract on the part of complainant, respondent is liable to complainant for the full purchase price of the lettuce, less the amount already paid, or a balance of \$781.00. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty (30) days from the date of this order, respondent shall pay to complainant, as reparation, \$781.00, with interest thereon at the rate of 13% per annum from May 1, 1984, until paid.

Copies of this order shall be served upon the parties.

T. J. POWER & COMPANY v. BRITT'S WHOLESALE PRODUCE. PACA
Docket No. 2-6677. Decided August 22, 1985.

Contract term—Resale—Dismissed.

Andrew Y Stanton, Presiding Officer
James S Behan, Grand Prairie, Texas, for complainant
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$2,550.00 in connection with the sale and shipment of a load of potatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but elected not to do so.

FINDINGS OF FACT

1. Complainant, T. J. Power & Company, is a partnership, composed of Patrick H. Power, Betty Jo Power, H. C. Petry, and T. J. Power, Sr. Trust, whose address is 2240 E. Union Bower Rd., Irving, Texas.

2. Respondent, Britt's Wholesale Produce, is a partnership composed of Callie W. Britt and Harley L. Britt, whose address is Box 1166, Spartanburg, South Carolina. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On January 6, 1984, complainant sold to respondent one truck-load of U.S. No. 1 potatoes consisting of 25 cartons of 100's at \$14.50 per carton, 100 cartons of 90's at \$12.50 per carton, 125 cartons of 80's at \$14.50 per carton, and 600 sacks of 10 ounce minimum at \$11.75 per sack, for a total of \$10,375.00, delivered. The contract was negotiated by Rogers Brokerage Co., Forest Park, Georgia. The broker issued a confirmation of sale on January 6,

1984, which reflected the above contract terms, except that it erroneously showed 50 cartons of 100's instead of 25, and 150 cartons of 80's instead of 125.

4. The potatoes were shipped on January 6, 1984, from complainant in interstate commerce to respondent, where they arrived on approximately January 9, 1984. Respondent unloaded the potatoes and had the 600 sacks of 10 ounce minimum inspected, which resulted in the following, in relevant part:

Products Inspected	Long Russet Potatoes in burlap sacks printed "Tee-pee Brand Potatoes, Packed By T J Power & Co., Carrizo Springs, Irving, Hereford, Muleshoe, Texas 75061, Main Office Irving, Texas 75061, Produce Of U.S.A., Net Wt 50 Lbs" Applicant states 600 sacks.
Condition of Load.	Stacked on pallets, applicants warehouse, above mentioned address
Temperature of Product:	Range 43 to 49 degrees F
Size:	Generally 10 to 22 ounces, mostly 12 to 15 ounces in weight Average 1% undersize
Quality:	Mature, fairly clean, fairly bright to bright, fairly well to well shaped Average 5% grade defects consisting of cuts and hollow heart.
Condition:	Firm. Average 2% damage by air cracks. Ranges from 3 to 5% in most samples, in many 9 to 11%, average 6% damage by Internal Black Spot Less than 1% soft rot.
Grade.	Meets quality requirements but fails to grade U.S. No. 1, 10 ounce minimum only account condition.

5. After receiving the inspection results, respondent informed the broker, which notified complainant. Complainant granted protection on the 600 sacks of potatoes. On January 10, 1984, the broker issued a confirmation of adjustment, on which it stated the inspection results and noted as follows: "On the basis of this inspection it

was mutually agreed that shipper would grant protection on these 10 oz. only."

6. Respondent eventually resold the 600 sacks of potatoes. On January 14, 1984, respondent sold 100 sacks to Anderson Flea Market, Anderson, South Carolina, for \$9.50 per sack, on January 19, 1984, respondent sold 250 sacks to J. B. Watson, Columbia State Farmers Market, Columbia, South Carolina, for \$9.00 per sack, and on January 23, 1984, respondent sold an additional 250 sacks to J. B. Watson at \$9.00 per sack, for a total of \$5,450.00. Respondent incurred expenses for freight and labor in connection with the resale, amounting to \$950.00.

7. Complainant sent respondent an invoice dated January 6, 1984, which respondent returned, writing thereon that complainant had allowed full protection on the 600 sacks of potatoes because of their condition and their failure to grade U.S. No. 1. Respondent also crossed out the price set forth on the invoice for the 600 sacks of potatoes, \$11.75 per sack, totaling \$7,050.00, and substituted \$7.50 per sack for \$4,500.00. Respondent has paid a total of \$7,825.00 to complainant, which includes full payment for the 25 cartons of 100's, the 100 cartons of 90's, and the 125 cartons of 80's, but only \$4,500.00 for the 10 ounce minimum potatoes, constituting \$2,550.00 less than the contract price.

8. A formal complaint was filed on August 22, 1984, which was within nine months from when the alleged cause of action herein accrued.

CONCLUSIONS

Respondent has paid complainant \$7,825.00 for the load of potatoes which it admittedly purchased, received, and accepted, or \$2,550.00 less than the original contract price of \$10,375.00. Respondent asserts that it deducted the \$2,550.00 from the contract price of the 600 sacks of 10 ounce minimum potatoes, remitting \$4,500.00 of the original price of \$7,050.00. Respondent claims that its deduction was justified, as the contract called for U.S. No. 1 potatoes, and when the load arrived at its place of business, the 600 sacks of 10 ounce minimum potatoes did not make grade. Respondent alleges that complainant agreed to grant full protection for these 600 sacks.

It is respondent's burden to prove its allegation that complainant agreed to grant full protection for the 10 ounce minimum potatoes, in alteration of the original contract terms. *American Banana Co., Inc. v. Marvin Gray*, 41 Agric. Dec. 539 (1982). Several factors lead us to conclude that respondent has sustained its burden of proof. One is that complainant has never denied that it granted full pro-

tection for the 600 sacks of potatoes. Another is that the record contains a May 9, 1984, letter to the Department from the broker, who states that complainant granted protection for the 10 ounce minimum potatoes based on the January 9, 1984, inspection, which had shown 5% grade defects, 2% air cracks, 6% internal black spots, and less than 1% decay (Finding of Fact 4). The broker also submitted a copy of its confirmation of adjustment, dated January 10, 1984, in which it had stated as follows: "On the basis of this inspection it was mutually agreed that shipper would grant protection on these 600 sacks of 10 oz. only." It is thus clear that complainant granted protection for the 10 oz. minimum potatoes. However, complainant contends that respondent's deductions are excessive, considering the inspection results. We do not agree. Respondent has submitted evidence that it resold 100 sacks of the 10 ounce minimum potatoes on January 14, 1984, for \$9.50 per sack, or \$9,050.00, 250 sacks on January 19, 1984, for \$9.00 per sack, or \$2,250.00, and 250 sacks on January 23, 1984, for \$9.00 per sack, or \$2,250.00, for a total of \$5,450.00. The test for propriety of resales is one of reasonableness. See *Dick Monroe Company v. Fred Karam & Sons*, 80 Agric. Dec. 546 (1971). We conclude that these resales were reasonable, based on the findings of the federal inspection. The results of the resales exceed the \$4,500.00 remitted to complainant for the 10 ounce minimum potatoes by \$950.00. Respondent claims that it deducted this additional \$950.00 as compensation for its expenditures for freight and labor. We find this deduction to be reasonable under the circumstances present here. Therefore, there is no merit to the complaint, and it should be dismissed.

ORDER

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

SIGMA PRODUCE CORP. INC. v. HARVEY C. HANSEN, d/b/a HARVEY'S.
PACA Docket No. 2-6685. Decided August 22, 1985.

Acceptance of goods makes receiver liable for freight—Suitable shipping condition warranty.

Where respondent threatened to rejected tomatoes it had already accepted and complainant agreed to take them back from respondent's customer, respondent is liable for freight from point of origin to destination. Complainant is entitled to full compensation for that part of the load customer disposed of, but not to freight charges incurred in connection with cartons not actually reshipped.

George S. Whitten, Presiding Officer.
Complainant, *pro se*
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$6,705.60, in connection with the sale in interstate commerce of a truckload of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant and asserting a counterclaim arising out of the same transaction in the amount of \$660.00. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in both the formal complaint and the counterclaim does not exceed \$15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified complaint and answer of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. The reply to the counterclaim was not verified and consequently is not in evidence. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. However, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Sigma Produce Corp. Inc., is a corporation whose address is P.O. Box 1683, Nogales, Arizona. At the time of the transaction involved herein complainant was licensed under the Act.

2. Respondent, Harvey C. Hansen, is an individual doing business as Harvey's, whose address is 1450 West Walnut, Suite A, Visalia, California. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about February 17, 1984, complainant sold to respondent 1,056 flats of tomatoes at \$5.85 per flat, plus \$.50 per flat for palletization and pre-cooling, or a total price of \$6,705.60, f.o.b.

4. On February 17, 1984, complainant shipped the 1,056 flats of tomatoes from loading point, in Nogales, Arizona to respondent in Visalia, California by truck. Following shipment respondent diverted

ed the truck to its customer in Norfolk, Virginia. Respondent paid the freight bill for the shipment to Norfolk in the amount of \$1.75 per flat, for a total of \$1,848.00.

5. After arrival in Norfolk, Virginia the tomatoes were federally inspected at the place of business of respondent's customer after unloading into respondent's customer's warehouse. The inspection took place on February 21, 1984, at 7:10 a.m., and showed temperatures ranging from 50 to 51°F. The inspection found that 19% of the tomatoes were soft, and that the tomatoes contained an average of 2% decay.

6. Following the inspection of the tomatoes, respondent's customer sold and shipped 396 flats, and then entered into negotiations directly with complainant to try to obtain an allowance as to all of the tomatoes. Respondent's customer informed complainant that in order for it to accept the tomatoes it would have to have an allowance of \$2.00 per flat. Complainant offered respondent's customer an allowance of \$1.00 per flat. Respondent's customer replied that it would have to receive at least \$1.50 per flat allowance. Complainant then informed respondent's customer that it would take the tomatoes back. At this point respondent's customer revealed that it had already shipped the 396 flats of tomatoes, but stated that it would get them returned. Complainant then entered into a transportation contract for shipment of the entire 1,056 flats of tomatoes to New York at a flat rate of \$700 or 66 cents per carton. When the truck arrived in Norfolk to pick up the 1056 flats of tomatoes only 660 flats were available, respondent having failed to secure the return of the remaining 396 flats. Complainant loaded the 660 flats and shipped them to New York for resale.

7. The formal complaint was filed on July 11, 1984, which was within nine months after the cause of action herein accrued. The counterclaim was filed on September 18, 1984, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Although complainant in the formal complaint claims that the entire purchase price of the tomatoes, or \$6,705.60, is due from respondent, it is clear from other statements made by complainant during the course of this proceeding that it does not expect to recover such amount. Complainant took back from respondent's customer 660 cartons of the tomatoes and apparently resold such tomatoes in New York, but submitted no evidence in this proceeding concerning the results of this resale. In fact what complainant seeks to recover in this proceeding is the original purchase price applicable to the 396 cartons of tomatoes retained by respondent's

customer, and in addition complainant seeks to recover freight in the amount of \$264.40 which it incurred as a direct result of not getting back from respondent's customer the entire shipment of 1056 flats of tomatoes.

While respondent apparently admits liability for the 396 cartons of tomatoes retained by its customer (having a contract value of \$2,514.60), respondent states that such amount should be reduced by the \$1.00 per flat allowance granted by complainant. We have carefully reviewed the evidence in this proceeding concerning the negotiations between complainant and respondent's customer after the arrival of the tomatoes, and we do not find any evidence that complainant agreed to a \$1.00 per flat allowance in regard to the 396 flats of tomatoes. Respondent additionally claims that its liability for the 396 cartons of tomatoes retained by its customer should be reduced by the amount of the freight from Nogales to Norfolk applicable to the entire load of 1056 flats, or \$1,848.00. It is clear from the record that respondent accepted the entire load of tomatoes by diverting such tomatoes from the original contract destination. It is also clear that its customer accepted the tomatoes by unloading such tomatoes from the truck and by selling a portion of them. Accordingly, respondent was liable for the freight applicable to the shipment from Nogales to Norfolk by virtue both of the terms of the f.o.b. contract between the parties and also, because of its acceptance of the tomatoes. See *In re Ben Gatz Company*, 38 Agric. Dec. 1038 (1979).

Respondent's only hope of recouping the freight is by proving damages resulting from a breach of contract by complainant. However, although the federal inspection in Norfolk indicates excessive condition defects in the tomatoes, respondent cannot show a breach of contract on the part of complainant due to the fact that the suitable shipping condition warranty applicable in f.o.b. sales (see 7 CFR § 46.43(i) & (j)) is expressly stated to assure delivery without abnormal deterioration "at the contract destination agreed upon between the parties." The contract destination agreed upon between the parties, as is made clear by the bill of lading and all other documents connected with the shipment of tomatoes, was Visalia, California, not Norfolk, Virginia. Accordingly, the suitable shipping condition warranty is not applicable, and respondent cannot show a breach of contract on the part of complainant. See *James Burns & Sons v. Chicago Potato Exchange*, 19 Agric. Dec. 1062 (1960).

When complainant agreed to take back the tomatoes from respondent's customer it did so gratuitously, since complainant already had notice, by virtue of the diversion of the tomatoes and be-

cause of the statement by respondent's customer that some of the tomatoes had been shipped, that the tomatoes had been accepted. However, complainant took back the tomatoes under threat of a wrongful rejection on the part of respondent's customer. The exact words used by respondent's customer to describe the opening of the negotiations were that he "made an offer . . . to accept the fruit with an allowance of \$2.00 per flat". The implication in the context of the situation then existing was that if the allowance was not forthcoming the fruit would not be accepted. We conclude on the basis of all of the evidence that complainant is entitled to the full contract price for the 396 flats of tomatoes retained by respondent's customer, or \$2,514.60. Complainant also claims freight in the amount of \$264.40 in connection with the 660 flats of tomatoes which it took back from respondent's customer and shipped to New York. The basis for this claim is as follows. Complainant secured a promise from respondent's customer that all 1056 flats of tomatoes would be available for complainant to ship to New York. Because of this promise complainant contracted for transportation for the entire 1056 flats of tomatoes at a rate of \$700.00, or 66 cents per flat. When the truck arrived to pick up the 1056 flats of tomatoes only 660 were available for shipment. Thus complainant was forced to pay transportation charges for 1056 flats of tomatoes but was only able to transport 660 flats of tomatoes. The additional freight applicable to the 396 cartons of tomatoes which complainant was unable to ship to New York amounted to \$264.40 at the rate of 66 cents per flat. Complainant has failed to show that agency authority existed on the part of respondent's customer so as to cause respondent to be liable to complainant for the failure of its customer in this regard. We conclude that the action of respondent's customer in promising to return the 1056 flats of tomatoes and in failing to return 396 flats cannot be imputed to respondent, and respondent is, therefore, not liable to complainant for the additional freight in the amount of \$264.40.

The entire amount which we have found to be due and owing from respondent to complainant is \$2,514.60. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Respondent's counterclaim was in the amount of \$660.00 for "unloading, storing, and reloading 660 flats of tomatoes". Respondent has furnished us no reason why complainant should be held liable for this amount. Accordingly, the counterclaim should be dismissed.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$2,514.60, with interest thereon at the rate of 13% per annum from March 1, 1984, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

KDN ENTERPRISES, INC., A CORPORATION; DONALD W. MOORE, AN INDIVIDUAL; and HENRY J. ESCHER, AN INDIVIDUAL, d/b/a J-B DISTRIBUTING Co. v. EMERSON H. ELLIOTT d/b/a EMERSON ELLIOTT PRODUCE. PACA Docket No. 2-6717. Decided August 22, 1985.

Failure to pay—Reparation awarded.

Thomas Heinz, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainants sought a reparation award against respondent in the amount of \$21,324.05 in connection with the sale and shipment of four trucklots of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon the respondent, who filed an answer admitting liability in the amount of \$16,475.30, and, in effect, denying liability as to the remainder of complainants' claim. On or about March 21, 1985, respondent was ordered to pay complainants the undisputed amount pursuant to section 7(a) of the Act (7 U.S.C. § 499g(a)), leaving \$4,848.75 in dispute.

Since the parties have waived oral hearing, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified
t and answer. The parties were given opportunities to
ditional evidence in the form of verified statements, and
ants submitted an opening statement and a
submitted an answering statement, but no

FINDINGS OF FACT

1. Complainants, KDN Enterprises, Inc., a corporation, Donald W. Moore, an individual, and Henry J. Escher, an individual, are partners doing business as J-B Distributing Co., with a mailing address at 727 W. Seventh Street, Suite 1235, Los Angeles, California 90017.

2. Respondent, Emerson H. Elliott, is an individual doing business as Emerson Elliott Produce, with a mailing address at P.O. Box 745, Casselberry, Florida 32707. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about August 8, 1984, complainants sold and shipped to respondent by ATF Truck one trucklot of lettuce with an FOB price of \$7,243.50. Respondent accepted this shipment upon arrival.

4. On or about August 28, 1984, Tom Lange Co., Inc., a brokerage house in Atlanta, Georgia sold to respondent on behalf of complainants one trucklot of lettuce with an FOB price of \$4,848.75. The lettuce was shipped via T.R. Transportation Truck. Respondent accepted this shipment upon arrival.

5. On or about September 1, 1984, complainants sold and shipped to respondent by Locke Truck one trucklot of lettuce with an FOB price of \$6,711.80. Respondent accepted this shipment upon arrival.

6. On or about September 2, 1984, complainants sold and shipped to respondent by Northern Alabama Truck one trucklot of lettuce with an FOB price of \$2,520.00. Respondent accepted this shipment upon arrival.

7. A formal complaint was filed on October 30, 1984, which was within nine months of the time the causes of action herein accrued.

CONCLUSIONS

Failure to pay for perishable agricultural commodities purchased in commerce constitutes unfair conduct in violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation may be awarded. Respondent previously has been ordered to pay the \$16,475.30 which he admits he owes to complainants. As to the remaining \$4,848.75 claimed by complainants, respondent apparently alleges this amount covers a trucklot of lettuce he purchased on August 28, 1984, not from complainants but rather from Tom Lange Co. in Atlanta, Georgia. To support this allegation, respondent submitted for the record a memorandum of sale from Tom Lange Co. Contrary to respondent's apparent contentions, that memorandum shows Tom Lange Co. negotiated the sale for the account of complainants with the express terms, "Shipper invoices direct." Complainants accordingly invoiced respondent for the August 28, 1984, sale, but respondent has neither paid for the shipment nor offered valid justi-

fication for his failure to do so. Respondent therefore will be ordered to pay \$4,848.75 plus interest as reparation to complainants.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainants as reparation \$4,848.75, with interest thereon at the rate of 13% per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

TANITA FARMS INC., *v.* THADDEUS J. SOBIECH d/b/a TED SOBIECH.
PACA Docket No. 2-6866. Decided August 26, 1985.

Admission of partial liability—Disputed amount to be determined subsequently.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely informal complaint was filed on December 10, 1984, and a formal complaint was filed on February 19, 1985. Complainant seeks to recover \$79,176.00 which amount is alleged to be the total purchase price for onions sold to and accepted by respondent in May and June, 1984. Respondent filed an answer to the formal complaint on June 27, 1984, admitting that \$32,100.00 of the amount claimed by complainant was due and owing to complainant on account of the transactions involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$32,100.00. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from July 1, 1984, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

G.A.C. PRODUCE Co. INC. v. OTAY PACKING Co. PACA Docket No. 2-6872. Decided August 26, 1985.

Admission of partial liability—Disputed amount to be determined subsequently.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely informal complaint was filed on March 25, 1985. Complainant seeks to recover \$53,166.00 which amount is alleged to be the total purchase price for tomatoes sold to and accepted by respondent in September, 1984. Respondent filed an answer to the formal complaint in June 27, 1985, admitting that \$50,574.00 of the amount claimed by complainant was due and owing to complainant on account of the transactions involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$50,574.00. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from November 1, 1984, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

METRO PRODUCE, INC. v. SAM TOCCO & SONS. PACA Docket No. 2-6882. Decided August 26, 1985.

Admission of partial liability—Disputed amount to be determined subsequently.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely formal complaint was filed on February 25, 1985. Complainant seeks to recover \$2,589.25 which amount is alleged to be the total purchase price for eight trucklots of potatoes sold to and accepted by respondent during August and September, 1984. Respondent filed an answer to the formal complaint on June 5, 1985, admitting that \$1,589.25 of the amount claimed by complainant was due and owing to complainant on account of the transaction(s) involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$1,589.25. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from November 1, 1984, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

J. A. Wood Co.-VISTA, INC., a/t/a J. A. Wood Co. v. M. Offutt Co.,
INC. PACA Docket No. 2-6680. Decided August 29, 1985.

Breach of contract—Suitable shipping condition—Reparation awarded.

George S. Whitten, Presiding Officer

Thomas R. Oliveri, Newport Beach, California, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$5,377.50 in connection with the shipment in interstate commerce of one truckload of lettuce. A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, but respondent did not file an answering statement. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, J. A. Wood Co.-Vista, Inc., is a corporation also trading as J. A. Wood Co., whose address is P.O. Box 9069, Phoenix, Arizona.

2. Respondent, M. Offutt Co., Inc., is a corporation whose address is 8282 Moberly Lane, Dallas, Texas. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about December 7, 1983, complainant sold to respondent one truckload containing 900 cartons of lettuce at \$5.00 per carton, plus 80 cents per carton for vacuum cooling, \$135.00 for brokerage, and \$22.50 for a Ryan temperature recorder, or a total price of \$5,377.50 f.o.b. Scottsdale, Arizona, with destination specified as Birmingham, Alabama.

4. On or about December 7, 1983, complainant shipped the truckload of lettuce from loading point in the state of Arizona to re-

spondent's customer in Birmingham, Alabama. The lettuce arrived at the place of business of respondent's customer on Friday, December 9, 1983, and was unloaded from the truck.

5. On December 12, 1983, 300 cartons of the lettuce were federally inspected at 10:30 a.m. while stacked inside a cooler room at the place of business of respondent's customer. Such inspection showed that the temperatures of the lettuce, in various locations, ranged from 38 to 39°F. The condition of the lettuce was stated to be as follows:

Heads or portions of heads not affected by condition defects are fresh and crisp. Wrapper Leaves: No decay affecting these leaves only. Head Leaves: Decay, 1 to 4 heads per carton, average 9% Bacterial Soft Rot in various stages affecting 1 to 6 leaves.

6. The formal complaint was filed on June 18, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

It is clear that the lettuce was accepted by respondent's customer when it was unloaded from the truck on December 9, 1983. Accordingly, respondent became liable to complainant for the full purchase price of the lettuce less any damages proven to have resulted from any breach of contract on the part of complainant.

The warranty of suitable shipping condition applicable to f.o.b. sales (see 7 CFR § 46.43(i) & (j)) provides in relevant part that the commodity, at time of billing, must be in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties. Section 46.44(2) of the Regulations provides good delivery standards relative to lettuce sold without any grade specifications. Such standards allow a maximum of 5% for decay affecting any portion of the head exclusive of wrapper leaves. Although the federal inspection made on the third day after arrival shows decay in excess of that which is allowed by the good delivery standards, such inspection covers only 300 cartons out of the total 900 cartons shipped to respondent's customer. Considering the percentage of decay present in the 300 cartons we are unable to say that the load of lettuce as a whole did not make good delivery. See *Mutual Vegetable Sales v. Select Distributors*, 38 Agric. Dec. 1359 (1979).

Since respondent accepted the lettuce and has not proven a breach of contract on the part of complainant, respondent is liable to complainant for the full purchase price of the lettuce, or

\$5,377.50. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$5,377.50, with interest thereon at the rate of 13% per annum from January 1, 1984, until paid.

Copies of this order shall be served upon the parties.

GLOBAL BERRY SALES, INC. v. TIDELAND FARMS PRODUCE, INC. PACA
Docket No. 2-6705. Decided August 29, 1985.

Cover purchase—Setoff allowed—Dismissed.

George S. Whitten, Presiding Officer
Complainant, *pro se*
J. Hardin Marion, Baltimore, Maryland, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$5,385.60 in connection with the shipment in interstate commerce of a truckload of strawberries.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting the essential allegations of the complaint, but alleging a setoff against complainant in the amount of \$5,385.60 in connection with a second load of strawberries purchased by respondent from complainant in interstate commerce. Complainant filed a reply to the setoff denying liability thereunder.

The amount claimed in neither the formal complaint nor setoff exceeds \$15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Global Berry Sales, Inc., is a corporation whose address is P.O. Box 5800, Oxnard, California. At the time of the transactions involved herein complainant was licensed under the Act.

2. Respondent, Tideland Farms Produce, Inc., is a corporation whose address is P O. Box 61, Salisbury, Maryland. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about May 8, 1984, complainant sold to respondent, one truckload containing 2,304 flats of strawberries at \$4.00 per flat f.o.b. Watsonville, California, plus \$.60 per flat for cooling, \$22.50 for a Ryan recorder, and freight to Brooklyn, New York in the amount of \$3,477.60, or a total invoice price of \$14,098.50.

4. On May 8, 1984, complainant shipped the 2,304 flats of strawberries from loading point in California to respondent in Brooklyn, New York. Respondent accepted the strawberries on arrival and has paid complainant only \$8,712.90, which leaves a balance due of \$5,385.60.

5. On or about May 15, 1984, complainant sold to respondent one truckload containing 2,112 flats of strawberries at \$4.00 per flat f.o.b. Watsonville, California, plus \$.60 per flat for cooling, and \$22.50 for a Ryan recorder.

6. Complainant shipped the 2,112 flats of strawberries on May 15, 1984, from loading point in California to respondent's customer Key Food Stores Cooperative Inc., in Brooklyn, New York.

7. The 2,112 flats of strawberries arrived at the place of business of respondent's customer on Sunday, May 20, 1984, and were federally inspected the following day. The federal inspection showed that the strawberries had an excessive number of soft and decayed berries. Respondent's customer rejected the strawberries, and respondent in turn rejected the strawberries back to complainant. Complainant took possession of the strawberries and had them resold for complainant's account.

8. Respondent had sold the strawberries to its customer Key Food Stores Cooperative Inc., for a price of \$6.60 per flat. Respondent's customer had advertised the strawberries, prior to arrival, at a sale price. When the berries arrived at the place of business of respondent's customer and were discovered to have an excessive amount of soft and decayed berries, respondent's customer made cover purchases of similar strawberries from three different suppliers at \$7.80 per flat. Respondent's customer billed respondent for the cover cost of \$1.20 per flat, or \$2,534.40. In addition respondent paid the freight on the rejected berries in the amount of \$2,851.20.

The total of the cover cost and the freight amounted to \$5,385.60. When respondent was billed by complainant for the 2,304 flats of strawberries shipped on May 8, 1984, respondent setoff against such bill the \$5,385.60, paying only the balance of \$8,712.90.

9. The formal complaint was filed on September 11, 1984, which was within nine months after the cause of action alleged therein accrued. The formal setoff was filed on November 14, 1984, which was within nine months after the cause of action therein accrued.

CONCLUSIONS

Respondent in its answer admitted the essential allegations of the complaint relative to the 2,304 flats of strawberries shipped on May 8, 1984. The only defense raised by respondent to complainant's action was a setoff concerning the May 15, 1984, transaction involving the purchase by respondent from complainant of 2,112 flats of strawberries. Complainant filed a reply to respondent's setoff in which it stated in relevant part as follows:

We realize that if a breach of contract occurs the consignee is entitled to cover. Our disagreement in this case is over the price paid for the strawberries purchased by the consignee to cover. Respondent has furnished receipts showing the purchase price at \$7.80. Our information however is that strawberries of suitable quality could have been purchased *easily* for no more than \$6.00. The question I am asking is basically whether the consignee is entitled to purchase strawberries at the low side of the f.o.b. and then, in the case of a breach, to cover by purchasing the most expensive strawberries available to replace them.

The cover purchase by respondent's customer was made immediately upon its discovery of the defective condition of the 2,112 flats of strawberries. This was necessitated by the fact that the strawberries were purchased for an advertised sale. The cover purchases were made from three different suppliers all of whom charged the same price for the berries. Respondent has furnished no evidence showing that a cover purchase could have been made of suitable berries for no more than \$6.00 per flat. Indeed, respondent's statement to this effect in its reply to the setoff was not sworn to. We find that the cover purchases made by respondent's customer were reasonable under the circumstances. The official comment to the Uniform Commercial Code section on cover (UCC § 2-712) states in relevant part that:

The test of proper cover is whether at the time and place the buyer acted in good faith and in reasonable

manner, and it is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective.

Respondent has admitted liability to complainant for the full purchase price of the May 8, 1984, strawberry transaction. However, respondent has also shown that it is entitled to setoff against the balance due on that transaction a like amount due from complainant to respondent on the May 15, 1984, transaction. Accordingly the complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

MISCELLANEOUS REPARATION ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

BULL & PRICE, INC. a/t/a ALLAN BULL PRODUCE v. CITY WIDE DISTRIBUTORS, INC. PACA Docket No. 2-6462. Order issued July 2, 1985.

ORDER ON RECONSIDERATION

A Decision and Order was issued in this proceeding on February 25, 1985, awarding reparation to complainant in the amount of \$1,706.40, plus interest. On March 18, 1985, respondent filed a petition for reconsideration, as a result of which the Order was stayed pending reconsideration.

The major thrust of respondent's petition for reconsideration was that the decision was based on inadmissible evidence. Respondent predicated its argument in this regard on its belief that unsworn evidence cannot be considered as evidentiary. However, in a proceeding of this nature certain unsworn evidence may be treated as evidentiary. Pursuant to 7 CFR § 47.7:

Where the facts and circumstances are deemed by the Director to warrant such action, the Division shall serve upon each of the parties a copy of the report made by the Division in connection with its investigation of the informal or formal complaint. Whenever the Secretary, or the Director, or the examiner deems it necessary, a supplemental investigation shall be made by the Division and a copy of the report thereon shall be served upon the parties. If an answer is filed by respondent, a copy of *any*

report or reports of investigation served upon the parties shall be filed with the hearing clerk and shall be considered as part of the evidence in the proceeding: Provided, That either party shall be permitted to submit evidence in rebuttal in the same manner as is provided in the regulations in this part for the submission of other evidence in the proceeding (emphasis added).

The above-quoted provision makes it clear that properly served reports of investigation are evidentiary in nature. In proceedings of this kind, where there is no opportunity for cross-examination of witnesses, it is often necessary that the presiding officer have available more evidence than the parties usually provide so as to assure that his decision is proper. The investigative report, including the attachments thereto, frequently provides the information necessary to reach a fair resolution of the dispute. Such is the case in this proceeding in which the evidence furnished by the parties was inconclusive and incomplete. The investigative report contained statements by Arthur M. Zurhorst of Corry Brokerage, and other information, which was essential to a full understanding of the nature of the dispute.

Respondent acknowledged in its conclusion that the decision of this tribunal is sustainable when it said in its Petition for Reconsideration that:

Two theories can explain this sequence of events: the first being the conclusion of the Tribunal, which is based on inadmissible evidence; the second being the Respondent's, which is based on admissible evidence.

Since the evidence relied on was admissible, we find no reason to change our decision because there was insufficient evidence.

Respondent's claim that it cannot be held liable because Corry Brokerage was not its agent lacks merit. As shown by its broker's memorandums, the facts show clearly that Corry Brokerage acted on its understanding that it had been given authority by respondent to negotiate purchases on its behalf. The function of a broker is to negotiate a purchase and sale for both parties. To this extent it is usually not considered to be the agent for only one party. In this case, if we were to find it to be the agent for one party as opposed to the other, the evidence of record would lead us to conclude it acted as respondent's agent since respondent has previously entered an arrangement with City Wide Distributors of Arkansas, Inc. under which Corry Brokerage had been given authority to make purchases on its behalf, which authority was not shown to have been rescinded prior to the date of the transactions. See *Ja-*

cobsen Produce, Inc. v. R. L. Burnett Brokerage Company, a/t/a/ Best Potato Products Company, 37 Agric. Dec. 1743 (1978). The prior activities of respondent obviously placed apparent authority in Corry Brokerage to act on its behalf. As stated in *George Arakelian Farms, Inc. v. Leonard O'Day Company*, 31 Agric. Dec. 1395, 1401 (1972), "By placing Kirchberg in a position of having apparent authority to act for him, O'Day thus became liable to complainant notwithstanding his lack of actual authority. In situations such as this where a principal by any act or conduct knowingly causes or permits another to appear as his agent, either generally or for a particular purpose, he will be estopped to deny such agency."

In view of the above, the only other point raised by respondent that needs to be addressed is whether respondent was subject to license. Respondent denies that it purchased \$230,000.00 worth of produce in 1983. Thus, it claims it was not subject to license as a retailer during that year. However, it ignores the other jurisdictional basis for licensing, i.e. that the business of buying or selling at least 2,000 pounds of produce in any day would subject it to license as a dealer. See 7 U.S.C. § 499a(6) and 7 CFR § 46.2(x). Respondent does not claim that it was solely a retailer.

All other issues raised by respondent were adequately addressed in the original Decision and Order.

In view of the above we find that the February 25, 1985 Decision and Order is supported by the evidence and the applicable law. Accordingly, the petition for reconsideration is dismissed. The Order of February 25, 1985 is reinstated, except that the reparation awarded shall be paid within 30 days from the date of this Order.

Copies of this Order shall be served upon the parties.

SYRACUSE & JENKINS PRODUCE CO., INC. v. GEORGE J. TURKE d/b/a TROPIC KING GROVES a/t/a SILVER PALM GROVES. PACA Docket No. 2-6542. Order issued July 5, 1985.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on May 15, 1985, awarding reparation to the complainant in the amount of \$10,107.90. In a telephone call on June 14, 1985, respondent requested that it be given an extension

¹ June 21, 1985, to file its petition for reconsideration. was granted, and respondent filed its petition on

Accordingly, the order of May 15, 1985 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition for reconsideration.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant, along with this order.

JOHN K. HARMON d/b/a HARMON COMPANY PRODUCE v. A. LEVY DIST. Co., INC. PACA Docket No. 2-6648. Order issued July 5, 1985.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on May 15, 1985, awarding reparation to complainant in the amount of \$190.22. By letter received in 1985, complainant has moved that this matter be reconsidered.

Accordingly, the Order of May 15, 1985, is hereby stayed. Respondent may have ten (10) days from receipt of this order to file an answer to the petition for reconsideration.

Copies of this Order shall be served upon the parties. A copy of complainant's petition shall be served upon the parties, along with this order.

DENNIS PRODUCE SALES, INC. v. CITY WIDE DISTRIBUTORS, INC. PACA Docket No. 2-6422. Order issued July 8, 1985.

ORDER ON RECONSIDERATION

A Decision and Order was issued in this proceeding on January 31, 1985, awarding reparation to complainant in the amount of \$158.50, plus interest. On February 19, 1985, respondent filed a petition for reconsideration, as a result of which the order was stayed pending reconsideration.

The major thrust of respondent's petition for reconsideration was that the decision was based on inadmissible evidence. Respondent predicated its argument in this regard on its belief that the evidence cannot be considered as evidentiary. However, in a proceeding of this nature certain unsworn evidence may be treated as evidentiary. Pursuant to 7 CFR § 47.7:

Where the facts and circumstances are deemed by the Director to warrant such action, the Division shall serve upon each of the parties a copy of the report made by the Division in connection with its investigation of the informal or formal complaint. Whenever the Secretary, or the Director, or the examiner deems it necessary, a supplemental investigation shall be made by the Division and a copy of the report thereon shall be served upon the parties. If an answer is filed by respondent, a copy of *any report or reports of investigation served upon the parties* shall be filed with the hearing clerk and *shall be considered as part of the evidence in the proceeding: Provided*, That either party shall be permitted to submit evidence in rebuttal in the same manner as is provided in the regulations in this part for the submission of other evidence in the proceeding (emphasis added).

The above-quoted provision makes it clear that properly served reports of investigation are evidentiary in nature. In proceedings of this kind, where there is no opportunity for cross-examination of witnesses, it is often necessary that the presiding officer have available more evidence than the parties usually provide so as to assure that his decision is proper. The investigative report, including the attachments thereto, frequently provides the information necessary to reach a fair resolution of the dispute. Such is the case in this proceeding in which the evidence furnished by the parties was inconclusive and incomplete. The investigative report contained statements by Arthur M. Zurhorst of Corry Brokerage, and other information, which was essential to a full understanding of the nature of the dispute.

Respondent acknowledged in its conclusion that the decision of this tribunal is sustainable when it said in its Petition for Reconsideration that:

Two theories can explain this sequence of events: the first being the conclusion of the Tribunal, which is based on inadmissible evidence; the second being the Respondent's, which is based on admissible evidence.

Since the evidence relied on was admissible, we find no reason to change our decision because there was insufficient evidence.

Respondent's claim that it cannot be held liable because Corry Brokerage was not its agent lacks merit. As shown by its broker's memorandums, the facts show clearly that Corry Brokerage acted on its understanding that it had been given authority by respondent to negotiate purchases on its behalf. The function of a broker is

to negotiate a purchase and sale for both parties. To this extent it is usually not considered to be the agent for only one party. In this case, if we were to find it to be the agent for one party as opposed to the other, the evidence of record would lead us to conclude it acted as respondent's agent since respondent has previously entered an arrangement with City Wide Distributors of Arkansas, Inc. under which Corry Brokerage had been given authority to make purchases on its behalf, which authority was not shown to have been rescinded prior to the date of the transactions. See *Jacobsen Produce, Inc. v. R. L. Burnett Brokerage Company, a/t/a/ Best Potato Products Company*, 37 Agric. Dec. 1743 (1978). The prior activities of respondent obviously placed apparent authority in Corry Brokerage to act on its behalf. As stated in *George Arakelian Farms, Inc. v. Leonard O'Day Company*, 31 Agric. Dec. 1395, 1401 (1972), "By placing Kirchberg in a position of having apparent authority to act for him, O'Day thus became liable to complainant notwithstanding his lack of actual authority. In situations such as this where a principal by any act or conduct knowingly causes or permits another to appear as his agent, either generally or for a particular purpose, he will be estopped to deny such agency."

In view of the above, the only other point raised by respondent that needs to be addressed is whether respondent was subject to license. Respondent denies that it purchased \$230,000.00 worth of produce in 1983. Thus, it claims it was not subject to license as a retailer during that year. However, it ignores the other jurisdictional basis for licensing, i.e. that the business of buying or selling at least 2,000 pounds of produce in any day would subject it to license as a dealer. See 7 U.S.C. § 499a(6) and 7 CFR § 46.2(x). Respondent does not claim that it was solely a retailer.

All other issues raised by respondent were adequately addressed in the original Decision and Order.

In view of the above we find that the January 31, 1985 Decision and Order is supported by the evidence and the applicable law. Accordingly, the petition for reconsideration is dismissed. The Order of January 31, 1985 is reinstated, except that the reparation awarded shall be paid within 30 days from the date of this Order.

Copies of this Order shall be served upon the parties.

TANITA FARMS, INC. v. CITY WIDE DISTRIBUTORS, INC. PACA Docket No. 2-6440. Order issued July 8, 1985.

ORDER ON RECONSIDERATION

A Decision and Order was issued in this proceeding on February 19, 1985, awarding reparation to complainant in the amount of \$91.25, plus interest. On March 12, 1985, respondent filed a petition for reconsideration, as a result of which the Order was stayed pending reconsideration.

The major thrust of respondent's petition for reconsideration was that the decision was based on inadmissible evidence. Respondent predicated its argument in this regard on its belief that unsworn evidence cannot be considered as evidentiary. However, in a proceeding of this nature certain unsworn evidence may be treated as evidentiary. Pursuant to 7 CFR § 47.7:

Where the facts and circumstances are deemed by the Director to warrant such action, the Division shall serve upon each of the parties a copy of the report made by the Division in connection with its investigation of the informal or formal complaint. Whenever the Secretary, or the Director, or the examiner deems it necessary, a supplemental investigation shall be made by the Division and a copy of the report thereon shall be served upon the parties. If an answer is filed by respondent, a copy of *any report or reports of investigation served upon the parties* shall be filed with the hearing clerk and *shall be considered as part of the evidence in the proceeding: Provided*, That either party shall be permitted to submit evidence in rebuttal in the same manner as is provided in the regulations in this part for the submission of other evidence in the proceeding (emphasis added).

The above-quoted provision makes it clear that properly served reports of investigation are evidentiary in nature. In proceedings of this kind, where there is no opportunity for cross-examination of witnesses, it is often necessary that the presiding officer have available more evidence than the parties usually provide so as to assure that his decision is proper. The investigative report, including the attachments thereto, frequently provides the information necessary to reach a fair resolution of the dispute. Such is the case in this proceeding in which the evidence furnished by the parties was inconclusive and incomplete. The investigative report contained statements by Arthur M. Zurhorst of Corry Brokerage, and other

information, which was essential to a full understanding of the nature of the dispute.

Respondent acknowledged in its conclusion that the decision of this tribunal is sustainable when it said in its Petition for Reconsideration that:

Two theories can explain this sequence of events: the first being the conclusion of the Tribunal, which is based on inadmissible evidence; the second being the Respondent's, which is based on admissible evidence.

Since the evidence relied on was admissible, we find no reason to change our decision because there was insufficient evidence.

Respondent's claim that it cannot be held liable because Corry Brokerage was not its agent lacks merit. As shown by its broker's memorandums, the facts show clearly that Corry Brokerage acted on its understanding that it had been given authority by respondent to negotiate purchases on its behalf. The function of a broker is to negotiate a purchase and sale for both parties. To this extent it is usually not considered to be the agent for only one party. In this case, if we were to find it to be the agent for one party as opposed to the other, the evidence of record would lead us to conclude it acted as respondent's agent since respondent has previously entered an arrangement with City Wide Distributors of Arkansas, Inc. under which Corry Brokerage had been given authority to make purchases on its behalf, which authority was not shown to have been rescinded prior to the date of the transactions. See *Jacobsen Produce, Inc. v. R. L. Burnett Brokerage Company, a/t/a/ Best Potato Products Company*, 37 Agric. Dec. 1743 (1978). The prior activities of respondent obviously placed apparent authority in Corry Brokerage to act on its behalf. As stated in *George Arakelian Farms, Inc. v. Leonard O'Day Company*, 31 Agric. Dec. 1395, 1401 (1972), "By placing Kirchberg in a position of having apparent authority to act for him, O'Day thus became liable to complainant notwithstanding his lack of actual authority. In situations such as this where a principal by any act or conduct knowingly causes or permits another to appear as his agent, either generally or for a particular purpose, he will be estopped to deny such agency."

In view of the above, the only other point raised by respondent that needs to be addressed is whether respondent was subject to license. Respondent denies that it purchased \$230,000.00 worth of produce in 1983. Thus, it claims it was not subject to license as a retailer during that year. However, it ignores the other jurisdictional basis for licensing, i.e. that the business of buying or selling at least 2,000 pounds of produce in any day would subject it to li-

cence as a dealer. See 7 U.S.C. § 499a(6) and 7 CFR § 46.2(x). Respondent does not claim that it was solely a retailer.

All other issues raised by respondent were adequately addressed in the original Decision and Order.

In view of the above we find that the February 19, 1985 Decision and Order is supported by the evidence and the applicable law. Accordingly, the petition for reconsideration is dismissed. The Order of February 19, 1985 is reinstated, except that the reparation awarded shall be paid within 30 days from the date of this Order.

Copies of this Order shall be served upon the parties.

LEMMONS' FARMS, INC. v. WILLIAM R. WILLIAMSON d/b/a WILLIAMSON FARMS. PACA Docket No. 2-6524. Order issued July 8, 1985.

ORDER DENYING PETITION FOR RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on April 22, 1985, awarding reparation to the complainant in the amount of \$493.50. By letter received May 28, 1985, complainant has moved that this matter be reconsidered.

The Rules of Practice provide, at 7 CFR § 47.24(a), that a petition for reconsideration shall be filed within 10 days from the date of service of the order. In this case, the order was served upon complainant on April 27, 1985. Therefore, complainant's petition was due to be filed no later than May 7, 1985, or 21 days before the petition was actually filed on May 28, 1985, and 17 days before such petition was even mailed on May 24, 1985, which date is shown by the postmark on the envelope.

Further, the petition was not mailed until 32 days after the date of the order, which exceeded the 30 day period within which the Department maintained jurisdiction. See 7 U.S.C. § 499g(c).

For the reasons stated above, complainant's petition for reconsideration is denied.

Copies of this order shall be served upon the parties.

SEABROOK BROTHERS & SONS, INC. v. WILTON CATERERS, INC. PACA
Docket No. 2-6741. Order issued July 8, 1985.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$6,737.00 in connection with a transaction involving the shipment of beans in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated May 2, 1985, complainant authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

V. H. AZHDERIAN AND CO., INC. v. GIANT FOOD, INC. PACA Docket No. 2-6783. Order issued July 9, 1985.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$7,481.70 in connection with a transaction involving the shipment of cantaloupes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated May 29, 1985, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of May 29, 1985, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GOLD COAST PACKING, INC. v. CITY WIDE DISTRIBUTORS. PACA
Docket No. 2-6474. Order issued July 12, 1985.

ORDER ON RECONSIDERATION

A Decision and Order was issued in this proceeding on February 19, 1985, awarding reparation to complainant in the amount of

\$178.50, plus interest. On March 12, 1985, respondent filed a petition for reconsideration, as a result of which the Order was stayed pending reconsideration.

The major thrust of respondent's petition for reconsideration was that the decision was based on inadmissible evidence. Respondent predicated its argument in this regard on its belief that unsworn evidence cannot be considered as evidentiary. However, in a proceeding of this nature certain unsworn evidence may be treated as evidentiary. Pursuant to 7 CFR § 47.7:

Where the facts and circumstances are deemed by the Director to warrant such action, the Division shall serve upon each of the parties a copy of the report made by the Division in connection with its investigation of the informal or formal complaint. Whenever the Secretary, or the Director, or the examiner deems it necessary, a supplemental investigation shall be made by the Division and a copy of the report thereon shall be served upon the parties. If an answer is filed by respondent, a copy of *any report or reports of investigation served upon the parties* shall be filed with the hearing clerk and *shall be considered as part of the evidence in the proceeding: Provided*, That either party shall be permitted to submit evidence in rebuttal in the same manner as is provided in the regulations in this part for the submission of other evidence in the proceeding (emphasis added).

The above-quoted provision makes it clear that properly served reports of investigation are evidentiary in nature. In proceedings of this kind, where there is no opportunity for cross-examination of witnesses, it is often necessary that the presiding officer have available more evidence than the parties usually provide so as to assure that his decision is proper. The investigative report, including the attachments thereto, frequently provides the information necessary to reach a fair resolution of the dispute. Such is the case in this proceeding in which the evidence furnished by the parties was inconclusive and incomplete. The investigative report contained statements by Arthur M. Zurhorst of Corry Brokerage, and other information, which was essential to a full understanding of the nature of the dispute.

Respondent acknowledged in its conclusion that the decision of this tribunal is sustainable when it said in its Petition for Reconsideration that:

Two theories can explain this sequence of events: the first being the conclusion of the Tribunal, which is based on in-

admissible evidence; the second being the Respondent's, which is based on admissible evidence.

Since the evidence relied on was admissible, we find no reason to change our decision because there was insufficient evidence.

Respondent's claim that it cannot be held liable because Corry Brokerage was not its agent lacks merit. As shown by its broker's memorandums, the facts show clearly that Corry Brokerage acted on its understanding that it had been given authority by respondent to negotiate purchases on its behalf. The function of a broker is to negotiate a purchase and sale for both parties. To this extent it is usually not considered to be the agent for only one party. In this case, if we were to find it to be the agent for one party as opposed to the other, the evidence of record would lead us to conclude it acted as respondent's agent since respondent has previously entered an arrangement with City Wide Distributors of Arkansas, Inc. under which Corry Brokerage had been given authority to make purchases on its behalf, which authority was not shown to have been rescinded prior to the date of the transactions. See *Jacobsen Produce, Inc. v. R. L. Burnett Brokerage Company, a/t/a/ Best Potato Products Company*, 37 Agric. Dec. 1743 (1978). The prior activities of respondent obviously placed apparent authority in Corry Brokerage to act on its behalf. As stated in *George Arakelian Farms, Inc. v. Leonard O'Day Company*, 31 Agric. Dec. 1395, 1401 (1972), "By placing Kirchberg in a position of having apparent authority to act for him, O'Day thus became liable to complainant notwithstanding his lack of actual authority. In situations such as this where a principal by any act or conduct knowingly causes or permits another to appear as his agent, either generally or for a particular purpose, he will be estopped to deny such agency."

In view of the above, the only other point raised by respondent that needs to be addressed is whether respondent was subject to license. Respondent denies that it purchased \$230,000.00 worth of produce in 1983. Thus, it claims it was not subject to license as a retailer during that year. However, it ignores the other jurisdictional basis for licensing, i.e. that the business of buying or selling at least 2,000 pounds of produce in any day would subject it to license as a dealer. See 7 U.S.C. § 499a(6) and 7 CFR § 46.2(x). Respondent does not claim that it was solely a retailer.

All other issues raised by respondent were adequately addressed in the original Decision and Order.

In view of the above we find that the February 19, 1985 Decision and Order is supported by the evidence and the applicable law. Accordingly, the petition for reconsideration is dismissed. The Order

of February 19, 1985 is reinstated, except that the reparation awarded shall be paid within 30 days from the date of this Order. Copies of this Order shall be served upon the parties.

NASH DECAMP COMPANY v. QUALITY FRUIT Co., INC. PACA Docket No. 2-6782. Order issued July 12, 1985.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$8,283.00 in connection with two transactions involving the shipment of grapes and peaches in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated June 3, 1985, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of June 3, 1985, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

TERRA ROJA, INC. a/t/a GREEN ACRES v. LA HACIENDA BRANDS, INC. PACA Docket No. 2-6802. Order issued July 19, 1985.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$6,179.00 in connection with a transaction involving the shipment of mixed fruits and vegetables, all being perishable agricultural commodities, in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated June 1, 1985, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of June 1, 1985, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

C. A. MIOSLAVICH v. FRUTAS DEL VALLE DE GUADALUPE S.A., JUGOS DEL VALLE S. A., and H. J. HEINZ COMPANY. PACA Docket No. 2-6438. Order issued July 26, 1985.

Decision by Victor W. Palmer, Acting Judicial Officer.

DENIAL OF PETITION TO REOPEN AND ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on April 22, 1985, finding in favor of respondent. By Petition filed May 8, 1985, complainant moved that this matter be reheard or reconsidered. On June 11, 1985, the Order of April 22, 1985, was stayed. On June 24, 1985, complainant filed, through new counsel, a "Request For Leave To File Supplemental Pleading In Support Of Complainants' Request For Rehearing And/Or Reconsideration." For the reasons set forth below all motions by complainant are denied.

In the Petition filed on May 8, 1985, complainant raised a number of matters which it claimed constituted erroneous findings and determinations on the part of the tribunal. None of those contentions has merit. Neither do any of the statements made by complainant's counsel at that time raise questions which were not previously considered by the presiding officer in reaching the decision in this proceeding. Rather, complainant's counsel at that time merely indulged himself in arguing points as to which he disagreed with the tribunal. The only point which warrants comment deals with complainant's claim that Jugos Del Valle and Frutas Del Valle met on or about October 5, 1982, to discuss methods by which to pay complainant despite a freeze on currency transactions. Complainant wished to point out that Mr. Francisco Lavat of Jugos was at such meeting. However, Mr. Luis A. Cetto-Cetto of Frutas stated in his testimony that he did not believe that Lavat was present at those meetings, and Mr. Ricardo Jiminez testified that in any event Mr. Lavat could have little to say with respect to such payments since Mr. Lavat could not tell Mr. Jiminez, an employee of Frutas, what to do. There may have been a meeting on October 4, 1982, at which Mr. Lavat was present, but complainant could not have known what the discussions were about since he was not a party to the meeting. In any event, the testimony of complainant throughout the oral hearing was not persuasive. He was not a credible witness.

ness for the most part. Rather, he showed a strong predilection for saying that which he perceived to be most convenient to him at the moment.

Of more serious importance is the petition to reopen filed by new counsel for complainant on June 24, 1985. In that motion complainant pointed out that there was a document submitted in evidence which was not discussed by complainant's original counsel in complainant's brief. Complainant now contends that that document constitutes an admission of liability on the part of Frutas to complainant. The date of the document was December 15, 1982. It was translated as saying:

"Dear Sirs: By means of this letter, we are requesting that you give us additional time to pay the debt owing in the amount of \$338,598.56 until December 31st of 1982 in that it is a requirement set forth in our tax laws that we be able to deduct the differential losses in the exchange rate. Waiting for your approval to same, we are hoping to receive your written authorization to this request. And, should we not receive such within ten days, we will assume that the request has been granted. Thanking you in advance for your most gracious cooperation that you have always extended to us, we remain attentively, (illegible signature), Frutas Del Valle De Guadalupe, S.A."

This letter was introduced into evidence through complainant. No explanation as to complainant's understanding of the meaning of that letter was made. Although, Mr. Cetto-Cetto of Frutas, and his employee Mr. Jiminez, were on the witness stand subsequent to the introduction of this letter into evidence, counsel for complainant failed to ask any questions of those individuals with respect to its contents. If complainant believed that the letter was so important as to constitute an admission, it is difficult to see how his counsel would have avoided asking questions with respect to it. It would have been particularly valuable to determine who might have signed the letter, and what might have been meant by the request for an additional time to pay \$338,598.56 after January 1, 1983. The large sum of money is not consistent with complainant's claim that it was owed \$95,455.41. The tribunal was aware of this document in rendering his decision, and determined that it was ambiguous, might not relate to the transactions with which we are concerned in this proceeding, and that in any event it was overridden by the strong and precise testimony of both Mr. Cetto-Cetto and Mr. Jiminez with respect to the negotiations for payment to complainant.

This tribunal will not reopen the proceeding at this time so as to permit further testimony on this particular document, not only for the above reasons, but also because there have been considerable legal expenses incurred on the part of all parties in this proceeding for a case involving a claim of only \$95,455.41. Awards of legal fees and expenses plus interest in the total amount of \$44,895.58 have already been made to respondents in this proceeding. Even more legal fees than those awarded have been incurred by the parties since fees for post hearing briefs are not included in the computation.¹ Fees of this nature are not warranted in view of the amount of money in controversy in this proceeding. Furthermore, the fees could be enlarged even more because after further consideration before the Department of Agriculture there lies a direct appeal to the United States District Court, and a trial de novo if the moving party so desires. The matter has to end somewhere. It is appropriate that this tribunal not consider any further arguments by new counsel at this time.

One other matter needs to be dealt with at this time. Subsequent to the issuance of the original decision, a third party which has an ostensible financial interest in the outcome of the case took it upon itself to write a letter to the Judicial Officer of the Department of Agriculture. The letter was on the letterhead of Corporate Development, Inc., 1407 Standiford Avenue #3, Modesto, California 95350. It was signed by Gerald N. Marquis, who claims that he is adversely affected by this decision. This tribunal is substantially similar to a court of law. It is highly improper for a third party to seek to take such direct action with respect to a case, which action included the submission of documents which it believes are pertinent to the decision, and which also included arguments with respect to the merits of the decision. We are raising this point in this Order on Reconsideration because it is important that all parties recognize that this tribunal must be accorded the same respect as is a court of law if it is to do its job properly. The submissions of this third party have not been considered.

ORDER

The petition to reopen the hearing is denied.

The petition for reconsideration is dismissed.

The order of April 22, 1985, is reinstated, except that the reparation award shall be paid within 30 days from the date of this Order.

¹ If complainant had prevailed, consideration would have been given to the merits of its claim of \$39,720.86 for fees and expenses.

Copies of this order shall be served upon the parties.

V. V. VOGEL & SONS FARMS, INC. v. CONTINENTAL FARMS PACA
Docket No. 2-6191. Order issued August 12, 1985.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), an order was issued on March 21, 1985, awarding reparation to complainant against respondent. The order was served upon respondent on March 26, 1985, and on April 4, 1985, respondent filed a petition for reconsideration. On May 10, 1985, the order of March 21, 1985, was stayed, and complainant was granted ten days from date of service of the stay order in which to file an answer to the petition for reconsideration. Complainant filed such answer on June 3, 1985.

The basic point raised by respondent in its petition, and the only point which need be dealt with here, concerns our interpretation of section 2-613 of the Uniform Commercial Code. Respondent urges that section 2-613 has no application to this case because such section contemplates a continuing contractual relationship between the buyer and the seller. Respondent states that Mr. Vogel ended the contractual relationship between the parties herein by repudiating the contract. Consequently, respondent states that there was no longer a "risk of loss" to be transferred since the contractual relationship was terminated. The only case cited by respondent in support of its contention is *Carlson v. Nelson*, 28 UCC Reporting Service 80, 285 NW 2d. 505 (Neb. S. Ct. 1979). Respondent states that in this case the appellate court remanded to the trial court under circumstances implying that if the trial court found that a "mutual rescission" had taken place the parties would have rescinded the contract and there would be no need to construe the application of section 2-613 thereto. Several factors lead us to reject respondent's argument. First, while it is certainly true that UCC Section 2-613 contemplates applicability to an ongoing contract, there is nothing in the UCC to indicate that a repudiated contract is not an ongoing contract. In fact, the code very definitely indicates the opposite. Section 2-611 states in part that "Until the repudiating parties next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.", and 2-610 specifically allows the ag-

grieved party to await performance by the repudiating party for a commercially reasonable time. Other parts of the UCC are to the same effect. The case cited by respondent concerned "mutual rescission" which is, of course, not the same as repudiation.

We have reconsidered our order of March 21, 1985, and find that respondent's contentions relative thereto are without merit. The order is supported by the applicable law and evidence. Accordingly, respondent's petition should be and hereby is dismissed. The stay order of May 10, 1985, is vacated and the order of March 21, 1985, is hereby reinstated. The reparation awarded to complainant in that order shall be paid within thirty days from the date of this order.

Copies of this order shall be served upon the parties.

MOSE MARTINOUS v. KEITH CONNELL, INC. PACA Docket No. 2-6637.
Order issued August 12, 1985.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on July 2, 1985, awarding reparation to the complainant in the amount of \$3,750.00. By letter received July 11, 1985, respondent has moved that this matter be reconsidered.

Accordingly, the order of July 2, 1985 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reconsider.

Copies of this order shall be served upon the parties. A copy of respondent's petition also shall be served upon the complainant.

KITAHARA FARMS INC., a/t/a KITAHARA PACKING CO. v. UNION FRUIT COMPANY. PACA Docket. No. 2-6664. Order issued August 12, 1985.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on July 1, 1985, awarding reparation to the complainant in the amount of \$10,324.33. By letter received July 10, 1985, respondent has moved that this matter be reconsidered.

Accordingly, the order of July 1, 1985 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reconsider.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant, along with this order.

NASH-DECAMP COMPANY v. FLOYD J. BEYER. PACA Docket No. 2-6667. Order issued August 19, 1985.

RULING ON RECONSIDERATION

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), a Decision and Order was issued on April 22, 1985, awarding reparation to complainant in the amount of \$700.00 plus interest. On May 6, 1985, respondent moved to be permitted to file a petition for reconsideration and, on June 14, 1985, the proceeding was stayed and respondent given an opportunity to file such a petition. Respondent filed a petition for reconsideration on June 28, 1985.

In his petition, respondent states that his agreement with the broker was for full price protection until the date of delivery. However this term was not contained in the broker's confirmation of sale, which respondent admittedly received. Respondent's claim that he objected to the confirmation is not supported by any evidence in the record.

Respondent argues that the Decision and Order erred in concluding that only a \$1.00 per sack price reduction was agreed to, and insists that the parties agreed to a price adjustment of \$2.00 per sack. However, there is no evidence in the record to support respondent's claims, and it must be rejected.

The arguments made by respondent in his petition for reconsideration are without merit. Therefore, the June 14, 1985, Stay Order is hereby vacated and the April 22, 1985, Decision and Order is reinstated. Respondent shall pay the amount awarded in the April 22, 1985, order within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

COLACE BROS., INC. v. A & J PRODUCE CORP. and/or ADVANCE BROKERAGE, INC. PACA Docket No. 2-6365. Order issued August 29, 1985.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), an order was issued on March 21, 1985, dismissing the complaint against both respondents. On March 27, 1985, complainant filed a request that the order of March 21, 1985, be stayed and the complainant be granted time in which to file a petition for reconsideration. Complainant's petition was filed on April 12, 1985, and on April 29, 1985, an order was issued staying our order of March 21, 1985. On April 4, 1985, the attorney for respondent Advance Brokerage, Inc., also filed a petition for reconsideration.

The matters raised in complainant's petition for reconsideration were considered at the time of the issuance of our order of March 21, 1985. We have reconsidered that order and find that complainant's contentions are without merit and that the order is stayed by the evidence and by the law applicable thereto. Accordingly, complainant's petition should be and hereby is dismissed.

Respondent Advance Brokerage, Inc., complains that on March 21, 1985, did not award brokerage in the amount of \$1,000 to respondent Advance Brokerage. This claim for such brokerage was made by Mr. Poulos in his affidavit submitted as a part of respondent's answer. The Rules of Practice provide for the filing of a motion for reconsideration in connection with the filing of a brief. Respondent Advance Brokerage, Inc., had opportunity to file its answer, but did not do so. Mr. Poulos in his affidavit states that the brokerage in this matter should be \$1,000. The reconsideration of such claim for brokerage should be and hereby is reinstated. The order of March 21, 1985, is hereby reinstated.

Copies of this order

M & M PRODUCE FARMS AND SALES *v.* SOL SALINAS, INC. PACA
Docket No. 2-6525. Order issued August 29, 1985.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), an order was issued on February 21, 1985, awarding reparation to complainant against respondent. On March 4, 1985, respondent filed a petition for reconsideration and the order of February 21, 1985, was stayed pending the issuance of a further order in this proceeding.

In its petition respondent contends that the order of February 21, 1985, is in error in several respects. Each of the matters raised by respondent was considered in arriving at the decision and order of February 21, and we find that that order is supported by the evidence and the law applicable thereto. Accordingly, respondent's petition should be and hereby is dismissed. The order of February 21, 1985, is hereby reinstated, and the reparation awarded to complainant in that order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

DOVEX INVESTMENT CORPORATION d/b/a DOVEX PACKING COMPANY
v. T-G APPLE INCORPORATED. PACA Docket No. 2-6821. Order
issued August 29, 1985.

ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of \$10,563.14 against respondent in connection with six transactions in interstate commerce involving shipments of apples. A copy of the formal complaint was served upon respondent, and respondent filed an answer thereto admitting that it is obligated to complainant as alleged in the complaint.

Complainant, Dovex Investment Corporation, is a corporation d/b/a Dovex Packing Company whose mailing address is P.O. Box 2800, Wenatchee, Washington 98801. Respondent, T-G Apple Incorporated, is a corporation whose mailing address is P.O. Box 399, Sebastopol, California 95472. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of a reparation order in this proceeding, the Department was advised that respondent had filed in the United

States Bankruptcy Court, Northern District of California, a voluntary petition for reorganization pursuant to Chapter 11 of the Bankruptcy Act (11 U.S.C. §§ 1101-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

REPARATION DEFAULT DECISIONS ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER

A.G. SHORE COMPANY *v.* GULF LAKE PRODUCE Co. PACA Docket No. RD-85-303. Decided August 15, 1985.

Respondent was ordered to pay complainant, as reparation, \$2,612.50 plus 13 percent interest per annum from April 1, 1984, until paid.

MENDEZ BROS PRODUCE COMPANY *v.* GEORGETOWN PRODUCE INC. PACA Docket No. RD-85-304. Decided August 15, 1985.

Respondent was ordered to pay complainant, as reparation, \$21,243.65 plus 13 percent interest per annum from July 1, 1984, until paid.

TALBOTT FARMS INC. *v.* JOHNNY D. RODRIQUEZ d/b/a JOHNNY RODRIQUEZ. PACA Docket RD-85-305. Decided August 15, 1985.

Respondent was ordered to pay complainant, as reparation, \$10,324.42 plus 13 percent interest per annum from April 1, 1983, until paid.

NICK DELIS Co. INC. *v.* WINSTON C. BAILEY d/b/a CLAUDE BAILEY PRODUCE Co. PACA Docket No. RD-85-306. Decided August 15, 1985.

Respondent was ordered to pay complainant, as reparation, \$19,332.50 plus 13 percent interest per annum from August 1, 1984, until paid.

Go/WESTERN PRODUCE & COMMODITIES INC. *v.* LAKE CITY WHOLE-
- - - - - " PRODUCE. PACA Docket No. RD-85-308. Decided

Respondent was ordered to pay complainant, as reparation, \$2,108.25 plus 13 percent interest per annum from April 1, 1984, until paid.

JOSEPHINE DOUGLASS d/b/a S.L. DOUGLASS v. DANNY G. SCURRY d/b/a RALEIGH BROKERAGE & DISTRIBUTING Co. PACA Docket No. RD-85-309. Decided August 20, 1985.

Respondent was ordered to pay complainant, as reparation, \$2,038.50 plus 13 percent interest per annum from November 1, 1984, until paid.

BUJULIAN BORS. INC. v. A. LEVY DISTRIBUTING Co. INC. PACA Docket No. RD-85-310. Decided August 20, 1985.

Respondent was ordered to pay complainant, as reparation, \$4,437.00 plus 13 percent interest per annum from August 1, 1984, until paid.

THE GROWER-SHIPPER POTATO Co. v. JACK F. BECKUM d/b/a BATESVILLE PRODUCE Co. PACA Docket No. RD-85-311. Decided August 20, 1985.

Respondent was ordered to pay complainant, as reparation, \$4,437.00 plus 13 percent interest per annum from August 1, 1984, until paid.

BONITA PACKING Co. a/t/a BETERAVIA FARMS v. TAYLOR-BYERS INC. PACA Docket No. RD-85-312. Decided August 20, 1985.

Respondent was ordered to pay complainant, as reparation, \$3,230.25 plus 13 percent interest per annum from August 1, 1984, until paid.

SUN WORLD INTERNATIONAL INC. a/t/a SUN WORLD v. BARTON'S PRODUCE INC. PACA Docket No. RD-85-313. Decided August 20, 1985.

Respondent was ordered to pay complainant, as reparation, \$8,397.25 plus 13 percent interest per annum from December 1, 1984, until paid.

EASTERN MICHIGAN VEGETABLE MARKETING Co. v. CORGAN & SON INC. PACA Docket No. RD-85-314. Decided August 23, 1985.

Respondent was ordered to pay complainant, as reparation, \$4,200.00 plus 13 percent interest per annum from September 1, 1984, until paid.

BONITA PACKING Co. INC. v. J. P. DANIEL PRODUCE INC. PACA Docket No. RD-85-315. Decided August 23, 1985.

Respondent was ordered to pay complainant, as reparation, \$17,654.70 plus 13 percent interest per annum from March 1, 1985, until paid.

MIKAMIE BROS. a/t/a MIKAMI BROTHERS POTATOES v. J.P. DANIEL PRODUCE INC. PACA Docket No. RD-85-316. Decided August 23, 1985.

Respondent was ordered to pay complainant, as reparation, \$17,527.00 plus 13 percent interest per annum from February 1, 1985, until paid.

IO/WESTERN PRODUCE & COMMODITIES INC. v. CORGAN & SON INC. PACA Docket No. RD-85-317. Decided August 23, 1985.

Respondent was ordered to pay complainant, as reparation, \$6,151.26 plus 13 percent interest per annum from July 1, 1985, until paid.

VAN BUREN COUNTY FRUIT EXCHANGE INC. v. J & M PRODUCE. PACA Docket No. RD-85-319. Decided August 23, 1985.

Respondent was ordered to pay complainant, as reparation, \$9,648.00 plus 13 percent interest per annum from January 1, 1985, until paid.

FARMERS POTATO EXCHANGE INC. v. JAMES MAJORS d/b/a J&M PRODUCE. PACA Docket No. RD-85-320. Decided August 27, 1985.

Respondent was ordered to pay complainant, as reparation, \$2,618.75 plus 13 percent interest per annum from December 1, 1984, until paid.

GERAWAN Co. INC. formerly: R.M. GERAWAN Co. INC. v. FRANK MARCHESOTTO COMPANY INC. PACA Docket No. RD-85-321. Decided August 27, 1985.

Respondent was ordered to pay complainant, as reparation, \$2,574.00 plus 13 percent interest per annum from August 1, 1984, until paid.

R. R. TODD COMPANY INC. v. FRANK MARCHESOTTO COMPANY INC. PACA Docket No. RD-85-322. Decided August 27, 1985.

Respondent was ordered to pay complainant, as reparation, \$1,657.00 plus 13 percent interest per annum from September 1, 1984, until paid.

CAROLINA PACKERS v. JACK W. MCNEIL d/b/a MCNEIL'S TOMATOES. PACA Docket No. RD-85-323. Decided August 27, 1985.

Respondent was ordered to pay complainant, as reparation, \$8,320.00 plus 13 percent interest per annum from July 1, 1984, until paid.

O.P. MURPHY PRODUCE COMPANY INC. a/t/a O.P. MURPHY & SONS v. JACK W. MCNEIL'S TOMATOES. PACA Docket No. RD-85-324. Decided August 27, 1985.

Respondent was ordered to pay complainant, as reparation, \$10,769.30 plus 13 percent interest per annum from November 1, 1984, until paid.

MONTEREY BAY PACKING Co. v. ROY E. BARKER PRODUCE, INC. and/or ROBERT SWIFT Co., INC. PACA Docket No. RD-2-6799. Decided August 29, 1985.

Respondent was ordered to pay complainant, as reparation, \$2,478.75 plus 13 percent interest per annum from September 1, 1984, until paid.

GRANADA MARKETING INC. v. DANNY G. SCURRY d/b/a RALEIGH BROKERAGE & DISTRIBUTING Co. PACA Docket No. RD-85-325. Decided August 30, 1985.

Respondent was ordered to pay complainant, as reparation, \$2,025.00 plus 13 percent interest per annum from November 1, 1984, until paid.

ORANGE-CO OF FLORIDA INC. v. DANNY G. SCURRY d/b/a RALEIGH BROKERAGE & DISTRIBUTING Co. PACA Docket No. RD-85-326. Decided August 30, 1985.

Respondent was ordered to pay complainant, as reparation, \$14,765.80 plus 13 percent interest per annum from January 1, 1985, until paid.

COFFING BROS. ORCHARD Co. INC. v. HEIDEMA FRUIT AND PRODUCE COMPANY. PACA Docket No. RD-85-327. Decided August 30, 1985.

Respondent was ordered to pay complainant, as reparation, \$26,048.44 plus 13 percent interest per annum from September 1, 1984, until paid.

THE GROWER-SHIPPER POTATO Co. v. B & C Foods. PACA Docket No. RD-85-328. Decided August 30, 1985.

Respondent was ordered to pay complainant, as reparation, \$23,758.50 plus 13 percent interest per annum from February 1, 1985, until paid.

A. LEVY & J. ZENTNER Co. v. TROY H. CRIBB & SONS INC. PACA Docket No. RD-85-329. Decided August 30, 1985.

Respondent was ordered to pay complainant, as reparation, \$17,970.80 plus 13 percent interest per annum from September 1, 1984, until paid.

**MISCELLANEOUS REPARATION DEFAULT ORDERS ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER.**

**PACIFIC GAMBLE ROBINSON Co a/t/a PACIFIC FRUIT & PRODUCE Co.
v. PRODUCE PRODUCTS INC. PACA Docket No. RD-85-267. Order
issued July 5, 1985.**

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on June 7, 1985, awarding reparation to the complainant in the amount of \$3,308.00. By letter received June 12, 1985, respondent has, in effect, moved that this matter be reopened after default. However, respondent has not submitted any explanation as to why it failed to file a timely answer. Accordingly, respondent will have ten (10) days from its receipt of this order to submit a "good reason" why it did not file a timely answer to the complaint. See 7 CFR 47.25(e). Respondent's failure to provide such a reason within the ten day period will result in the immediate issuance of a Default Order.

The June 7, 1985, Default Order is hereby stayed.
Copies of this order shall be served upon the parties.

FRESH WESTERN MARKETING, INC. v. CORGAN & SON, INC. PACA
Docket No. RD-85-198. Order issued July 11, 1985.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties.

MCRAE PRODUCE CO., INC. v. CORGAN & SON, INC. PACA Docket No. RD-85-297. Order issued July 11, 1985.

ORDER DENYING MOTION TO REOPEN AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. A Default Order was issued on June 24, 1985, in the amount of \$6,727.50. In a letter filed on June 18, 1985, but not processed until after the Default Order was issued, respondent moved to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that good reason has not been shown why the relief requested in the motion should be granted. Respondent's president, Curt Corgan, states in the motion to reopen that he has been ill "off and on" from asthma for several months, and doesn't remember receiving the complaint. However, there can be no question that the complaint was received, as the record contains a signed return receipt card, showing service of the complaint on April 12, 1985. Regarding Mr. Corgan's claim that he has been intermittently ill from asthma, it is difficult to conceive how such an affliction could have prevented him from filing a timely answer within the 20 day

period allowed for the purpose, especially during those periods in which he was not ill. Therefore, respondent's motion is denied. The reparation awarded in the June 24, 1985, order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

NOGALES FRUIT & TOMATO DIST. INC. v. CARBY DIST. CO. INC. PACA
Docket No. RD-85-300. Order issued July 11, 1985.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$4,682.60 in connection with a transaction involving the shipment of produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated July 10, 1985, complainant authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

SMITH POTATO, INC. v. T & J FOODS. PACA Docket No. RD-85-209.
Order issued July 17, 1985.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$3,560.00 in connection with a transaction involving the shipment of potatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated June 19, 1985, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of June 19, 1985, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

R-J DISTRIBUTING Co., INC. v. JALI PRODUCE Co., INC. PACA Docket No. RD-85-229. Order issued July 17, 1985.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$431.85 in connection with a transaction involving the shipment of grapes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter filed with the Department on June 18, 1985, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter filed on June 18, 1985, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

FARM PAK PRODUCTS, INC. v. ANDY'S PRODUCE Co. PACA Docket No. RD-85-294. Order issued July 17, 1985.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$580.00 in connection with a transaction involving the shipment of yams in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated June 7, 1985, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of June 7, 1985, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

FRANK S. ECKEL III and THE PRODUCE CENTER, INC. d/b/a SKIPS CONSOLIDATION *v.* SAM WANG FOOD CORP. INC. PACA Docket No. RD-85-186. Order issued July 18, 1985.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. Subsequent to the issuance of a March 30, 1984, Default Order, respondent filed a motion to reopen the proceeding after default and to allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)). This motion was denied by order dated June 15, 1984. Respondent's request for reconsideration was denied on September 18, 1984. Respondent then took an appeal to the United States District Court for the District of Columbia which, on December 20, 1984, remanded this matter back to the Secretary for a "hearing on the merits of [respondent's] claims * * *."

Accordingly, respondent's default in the filing of an answer is set aside. Respondent has ten days from receipt of this order to file an answer to the complaint. Under the Rules of Practice, 7 CFR 47.20, the answer must be verified to be considered as evidence. Failure to file a timely answer will result in reissuance of the default order. No extension of time will be granted.

Copies of this order shall be served upon the parties. A copy of the formal complaint shall be served up on respondent and its attorney.

STEVCO INC. *v.* NORMAN L GATINEAU d/b/a GATINEAU ENTERPRISES. PACA Docket No. RD-84-226. Order issued July 18, 1985.

ORDER DENYING MOTION TO REOPEN AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. A Default Order was issued on May 2, 1985, directing the respondent to pay the complainant \$1,725.83 plus interest. In a telegram dated June 20, 1985, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25(e) of the Rules of Practice (7 CFR 47.25(e)).

In his motion, the respondent claims that the Department's letter dated June 10, 1985, which served the Default Order upon him, was his first indication that a Default Order had been issued.

However, the respondent's claim does not indicate that service was improper. In his June 20, 1985, telegram, the respondent gave his address as 1513B Grant Avenue, Philadelphia, Pennsylvania. This is the address to which all correspondence has been mailed. On May 2, 1985, the Department sent to respondent, at that address, a certified letter enclosing a copy of the Default Order. However, the letter was returned as undelivered, and it was remailed, by regular mail, on June 10, 1985. The formal complaint had been sent certified mail to this address on January 25, 1985, and was sent again by regular mail on March 5, 1985, when the certified letter was returned undelivered. An April 16, 1985, letter by the Department, notifying the respondent that he was in default, was also sent to the address given by respondent in his June 20, 1985, telegram. Therefore, respondent has been properly served with all relevant documents, in accordance with 7 CFR 47.4.

In any event, respondent's motion to reopen was filed almost three weeks after the May 2, 1985, Default Order became final on June 1, 1985. The Department is thus without any further jurisdiction over this case. See *7 U.S.C. 499g(c); American Fruit Grow. v. Lewis D. Goldstein F&P Corp.*, 78 F. Supp. 309 (E.D. Pa. 1948); *Produce Associates, Inc. v. New Linden Price Rite, Inc.*, 42 Agric Dec. 674 (1983).

For the reasons stated above, respondent's motion to reopen after default is denied.

Copies of this order shall be served upon the parties.

GRENADA MARKETING, INC., a/t/a RICHARD A. GLASS Co. v. WESTERN PRODUCE COMPANY. PACA Docket No. RD-85-265. Order issued July 18, 1985.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on June 7, 1985, awarding reparation to the complainant in the amount of \$6,048.00. By motion received June 21, 1985, respondent has moved that this matter be reopened after de-

of June 7, 1985, is hereby stayed. Com-
51 days from receipt of this order to file
an after default.

Copies of this order shall be served upon the parties. A copy of respondent's motion shall be served upon the complainant.

FRANCIS PRODUCE Co., INC. v. TOMATO of VA. PACA Docket No. RD-85-211. Order issued August 13, 1985.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, subsequent to the issuance of a Default Order on April 24, 1985, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and respondent is given 10 days to file an answer to the complaint. The answer should be submitted in triplicate. If an answer is not filed within the 10 day period, the April 24 1985, Default Order will be reinstated.

Copies of this order shall be served upon the parties.

ANTHONY J. PODESTA d/b/a ANTHONY PODESTA, INC. v. FOPPIANO PACKING COMPANY, INC. a/t/a JMB PACKING Co. PACA Docket No. RD-85-220. Order issued August 13, 1985.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distribu-*

tors, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties.

RESNIKOFF AND KIKUTA INC. a/t/a R & K DISTRIBUTORS v. WINDMILL FARMS INC. PACA Docket No. RD-85-265. Order issued August 12, 1985.

ORDER DENYING MOTION TO REOPEN AFTER DEFAULT, VACATING STAY ORDER, REINSTATING DEFAULT ORDER

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, subsequent to the issuance of a Default Order on April 2, 1985, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)). A Stay Order was issued on April 16, 1985, staying the proceeding and giving the respondent 10 days from its receipt thereof to file a good reason why it failed to file a timely answer, pursuant to 7 CFR 47.25(e). Respondent filed a response on April 24, 1985, but failed to present any reason why it did not file a timely answer. Therefore, respondent's motion to reopen after default is denied.

The April 16, 1985, Stay Order is vacated and the April 2, 1985, Default Order is reinstated. The reparation awarded in the April 2, 1985, order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

GROWERS MARKETING SERVICE, INC. v. WALDRON PRODUCE CO. PACA Docket No. RD-85-268. Order issued August 13, 1985.

ORDER VACATING STAY ORDER, REINSTATING DEFAULT ORDER

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), the respondent failed to file a timely answer and a Default Order was issued on April 1985. However, subsequent to the issuance of the Default Order, respondent filed a proposed answer, in which it denied listed answer did not set forth any reason and, on June 17, 1985, an order was

issued, staying the Default Order and giving respondent an opportunity to submit a "good reason" why the answer was not filed within the specified time period. See 7 CFR § 47.25(e).

Respondent has submitted a letter dated June 19, 1985, in which it asserts that complainant should look for payment to an Eddie Hall, and not to respondent. This does not constitute a "good reason" to justify the late filing of respondent's proposed answer. Even if the proposed answer were considered, it does not deny the allegations of the complaint that complainant overpaid respondent by issuing two checks for the same transaction. In its proposed answer, respondent admits depositing the first check, and a copy of the second check, contained in the record, reveals that it was deposited in the same bank account.

As respondent has failed to provide a good reason for reopening the default, the June 17, 1985, Stay Order is hereby vacated and the June 7, 1985, Default Order is reinstated. The amount awarded in the Default Order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

In re: JOSE REIMONDEZ. P.Q. Docket No. 72. Decided July 2, 1985.

Civil penalty—Consent.

Fronda Woods, for complainant.

Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120 and 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 94.1 *et seq.*). The parties have agreed that the proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Jose Reimondez, respondent, is an individual whose address is 1751 S.W. 24th Street, Miami, Florida 33145.

2. On or about October 18, 1984, at Miami, Florida, the respondent presented for inspection pork products from Spain.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred seventy-five dollars (\$375), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: THELMA A. DOUGLAS. P.Q. Docket No. 40. Decided May 22, 1985.

Importing yams without permit—Civil penalty.

Respondent imported yams without a permit. Respondent failed to file an answer to complaint. Respondent was assessed a civil penalty of \$500.00.

Thomas Bundy, for complainant

Respondent, pro se

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act (Act) (7 U.S.C. § 151 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent violated the regulations (7 CFR § 319.56 *et seq.*) promulgated pursuant to the Act.

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on January 24, 1985.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting or explaining the allegations in the complaint and requesting a

oral hearing would constitute an admission of such allegations and a waiver of such hearing. More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Thelma A. Douglas, herein referred to as the respondent, is an individual whose address is 1 Maple Street, White Plains, New York 10603.

2. On or about May 22, 1984, the respondent imported into John F. Kennedy International Airport, Jamaica, New York, three (3) yams, in violation of section 319.56-2 of the regulations (7 CFR § 319.56-2), because the yams, which originated in the country of Jamaica, were not imported under permit, as required.

3. On or about May 22, 1984, the respondent imported into John F. Kennedy International Airport, Jamaica, New York, three (3) yams, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the yams, which originated from the country of Jamaica, were not imported in compliance with regulations, or conditions and procedures (7 CFR § 319.56-2(e) and 7 CFR 319.56-2m), as required.

CONCLUSION

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations thereunder. Therefore, the following order is issued.

ORDER

Respondent is hereby assessed a civil penalty of five hundred dollars (\$500), which shall be payable no later than thirty (30) days from the date of this Order becomes effective. This civil penalty shall be made payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Thomas E. Bundy, U.S. Department of Agriculture, Office of the General Counsel, Room 2422-South Building, Washington, D. C. 20250-1400.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is

an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This decision and order became final July 3, 1985.—Ed.]

In re: WILLIAM J. VERNAY MOVING AND STORAGE. P.Q. Docket No. 93. Order issued July 10, 1985.

Decision by William J. Weber, Administrative Law Judge.

ORDER OF DISMISSAL

Complainant has filed a Motion to Dismiss on the ground that formal adjudication is not necessary in order to effectuate the purposes of the program.

IT SHOULD BE AND HEREBY IS ORDERED that the Complaint is dismissed without prejudice.

In re: JUAN MORALES FLORES, d/b/a GUAYABOTA BRAND. P.Q. Docket No. 66. Order issued June 3, 1985.

Imported fruit not handled per regulations—Respondent failed to answer complainant—Civil penalty—Default.

*Kris Ihejiri, for complainant
Respondent, pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912 as amended, (Act) (7 U.S.C. §§ 151 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent Juan Morales Flores d/b/a Guayabota Brand, violated the Act and sections 318.58-2 and 318.56-2 of the regulations promulgated thereunder (7 CFR § 318.58-2 and § 318.56-2) Copies of the complaint and Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon Mr. Juan Morales Flores.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, Mr. Flores was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the com

plaint, and that failure to file an answer to, or plead specifically to, any allegations in the complaint would constitute an admission of such allegation pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Mr. Flores was also informed that the failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

Mr. Flores filed no answer or any other response during the twenty-day period. Mr. Flores's failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Mr. Flores's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since Mr. Flores is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Juan Morales Flores, respondent herein, doing business as "Guayabota Brand," is an individual whose mailing address is, Buzan 590, Bo Guayabota, Yabucoa, Puerto Rico 00767.

2. On or about April 28, 1984, the respondent moved from Puerto Rico to New York approximately 250 cartons of mangoes, in violation of section 318.58-2 of the regulations (7 CFR § 318.58-2) because the mangoes were not fumigated and otherwise handled as provided in section 318.58-3d of the regulations (7 CFR § 318.58-3d).

3. On or about May 4, 1984, the respondent offered for shipment to P.R. Marine Management, a common carrier, in Puerto Rico, approximately 400 wooden crates of mangoes, in violation of section 318.56-2 of the regulations because the mangoes were not fumigated and otherwise handled as provided in section 318.58-3d of the regulations (7 CFR § 318.58-3d).

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By his silence respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following order is therefore, issued.

ORDER

Respondent Juan Morales Flores, d/b/a Guayabota Brand, is hereby assessed a civil penalty of one thousand dollars (\$1,000) which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Esq., Office of the General Counsel, Room 2422, South Building, Washington, United States Department of Agriculture, Washington, D. C. 20250-1400.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Default Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This decision became final July 13, 1985.—Ed.]

In re: LUFTHANSA GERMAN AIRLINES, and NEIMAN MARCUS. P.Q.
Docket No. 71. Order issued August 1, 1985.

Civil penalty—Consent.

William Jenson, for complainant.

Anthony A. Santangelo, East Meadow, New York, for respondent Lufthansa German Airlines.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION BY LUFTHANSA GERMAN AIRLINES

This proceeding was instituted under the Act of February 2 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Lufthansa German Airlines and Neiman Marcus, respondents, violated the Act and regulations promulgated thereunder (9 CFR § 92.1 *et seq.*). Respondent, Lufthansa German Airlines, has agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and has agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent, Lufthansa German Airlines, specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent, Lufthansa German Airlines, also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Lufthansa German Airlines, respondent, is an entity whose address is 1640 Hempstead Turnpike, East Meadow, New York 11554.

2. On or about October 4, 1983, respondent imported approximately 672 kilograms of frozen venison meat from West Germany into the United States.

CONCLUSIONS

Respondent Lufthansa German Airlines having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

Respondent, Lufthansa German Airlines, is assessed a civil penalty of three hundred seventy-five dollars (\$375.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to William G. Jenson, Office of the General Counsel, Room 2422, South Building, 14th and Independence Ave., S.W., United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent, Lufthansa German Airlines.

In re: UNITRAMP. P.Q. Docket No. 101. Decided August 2, 1985.

Foreign origin garbage abroad vessel—Civil penalty—Consent.

Joseph Pembroke, for complainant.

S. Michael Ritter, Chicago, Illinois, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120), the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*) and the Act of August 20, 1912, as amended (7 U.S.C. §§ 161, and 162), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Unitramp, respondent violated the Act and regulations promulgated thereunder (9 CFR § 94.5 *et seq.*) and (7 CFR § 330.400 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegation in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Unitramp, respondent, is a corporation located in Paris, France. Their agent in the United States is International Great Lake Shipping Company whose address is 9402 South Ewing Avenue, Chicago, Illinois 60617.

2. On or about December 3, 1984, respondent on its ship the M/V Eglantine, arrived in Chicago with foreign origin garbage on board.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order will be issued.

ORDER

The respondent is assessed a civil penalty of four hundred dollars (\$400) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: CONTINENTAL AIRLINES and WEST CENTRAL PRODUCE, INC.
P.Q. Docket No. 88. Decided June 24, 1985.

Imported fruit released by Continental Airlines without being disinfected—Civil penalty.

Respondent Continental Airlines imported blackberries infested with insects and released fruit to West Central Produce without disinfecting it. Respondent Continental Airlines was assessed a civil penalty of \$750.00

Mark Dopp, for complainant.

Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER FOR CONTINENTAL AIRLINES

This proceeding was instituted under the Act, as amended (7 U.S.C. § 151 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 319.56-6(a) of the regulation promulgated thereunder (7 CFR §§ 319.56-6(a)). Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the com-

plaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegation in the complaint would constitute an admission of such allegation pursuant to section 1.141 of the Rules of Practice (7 CFR § 1.141), and a waiver of such hearing. The letter also advised the respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver, on his part, of oral hearing. On May 6, 1985, the respondent filed a letter which purported to explain its release of insect infested blackberries at Los Angeles International Airport, as charged in paragraph III of the complaint. Respondent did not request an oral hearing.

Respondent's failure to deny or otherwise respond to the allegations in paragraph III constitutes an admission of such allegation, pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent has admitted to all the material allegations of fact in the complaint, and his failure to request a hearing constitutes a waiver of such hearing. There being no basis for a hearing, and after due consideration of respondent's explanations, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Continental Airlines, herein referred to as the respondent, is a corporation doing business at Los Angeles International Airport with an address of 50 West Century Boulevard, Los Angeles, California 90045.

2. On or about February 6, 1985, the respondent Continental Airlines imported 65 cartons of blackberries in violation of section 319.56-6(a) of the regulations (7 CFR § 319.56-6(a)) in that the blackberries were infested with insects (Thysanoptera) and were released by respondent Continental to West Central Produce without being disinfected, as required.

CONCLUSIONS

In its answer, respondent did not deny any of the allegations in the complaint. Respondent's explanations as to the allegations contained in paragraph III are unpersuasive. Respondent was aware that the release of infested fruit without proper treatment was and is prohibited. Forgetfulness on the part of the respondent is not an adequate defense to the violation of a regulation. The asserted defenses have been considered and are unpersuasive as to the issue of mitigation of the requested sanction.

By reason of the Findings of Fact set forth above the respondent has violated the Act and regulations promulgated thereunder. After due consideration of respondent's explanations, the following order is issued.

ORDER

Respondent, Continental Airlines, is hereby assessed a civil penalty of seven hundred fifty dollars (\$750). The respondent shall send, payable to the "Treasurer of the United States" a certified check or money order, to Mark D. Dopp, Office of the General Counsel, Room 2322, South Building, United States Department of Agriculture, Washington, D. C. 20250, not later than thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This decision and order for Continental Airlines became final August 10, 1985.—Ed.]

re: OSCAR DARIO RIOS. P.Q. Docket No. 81. Decided June 14, 1985.

Importing ham without certificate—Importing apples that were prohibited—Civil penalty.

Respondent imported ham and apples for Mexico in violation of regulations. Respondent was assessed a civil penalty of penalty of \$250.00.

Mark Dopp, for complainant.

Respondent, pro se.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Act of August 20, 1912, as amended (Act) (7 U.S.C. § 151 *et seq.*), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 94.9(b) of the regulations promulgated thereunder (9 CFR § 94.9(b)). Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegation in the complaint would constitute an admission of such allegation pursuant to section 1.141 of the Rules of Practice (7 CFR § 1.141), and a waiver of such hearing. The letter also advised the respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver, on his part, of oral hearing. On April 26, 1985, the respondent filed a letter which purported to explain his importation of pork and apples from Mexico as charged in paragraphs II and III of the complaint. Respondent did not request an oral hearing.

Respondent's failure to deny or otherwise respond to the allegations in paragraphs II and III constitutes an admission of such allegations, pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent has admitted to all the material allegations of fact in the complaint, and his failure to request a hearing constitutes a waiver of such hearing. There being no basis for a hearing, and after due consideration of respondent's explanations, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Oscar Dario Rios, herein referred to as the respondent, is a individual whose address is 720 Millbury Avenue, La Puente, California 91746.

2. On or about September 17, 1984, the respondent violated section 94.9(b) of the regulations (9 CFR § 94.9(b)) in that responder imported from Mexico, a country in which hog cholera exists, at El Paso, Texas, one (1) pound of pork (ham) without a certificate, as required.

3. On or about September 17, 1984, the respondent violated section 319.56 of the regulations (7 CFR § 319.56) in that the respondent imported, at El Paso, Texas, apples from Mexico, which were prohibited entry.

CONCLUSIONS

In his answer, respondent did not deny any of the allegations in the complaint. Respondent's explanations as to the allegations contained in paragraphs II and III are unpersuasive. Respondent was given two opportunities to disclose what, if any, food he had in his car and he failed to do so. Forgetfulness on the part of the respon-

ent is not an adequate defense to the violation of a regulation. The asserted defenses have been considered and are unpersuasive as to the issue of mitigation of the requested sanction.

By reason of the Findings of Fact set forth above the respondent has violated the Act and regulations promulgated thereunder. After due consideration of respondent's explanations, the following order is issued.

ORDER

Respondent Oscar Dario Rios is hereby assessed a civil penalty of two hundred fifty dollars (\$250). The Respondent shall send, payable to the "Treasurer of the United States" a certified check or money order, to Mark D. Dopp, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250, not later than thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This decision and order became final August 19, 1985.—Ed.]

In re: ALLIED VAN LINES, INC. P.Q. Docket No. 105. Decided August 28, 1985.

Transporting article from gypsy moth high risk area—Civil penalty—Consent.

Kevin Thiemann, for complainant.

Joseph P. Tuohy, Chicago, Illinois, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended, and the Federal Plant Pest Act (7 U.S.C. §§ 151-164a and 167, and 150aa *et seq.*) (Acts) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Allied Van Lines, Inc., respondent, violated the Acts and regulations promulgated thereunder (7 CFR § 301.45 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in this complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Allied Van Lines, Inc., respondent, is a corporation doing business at 25th and Roosevelt Road, Broadview, Illinois 60158.

2. On or about October 24, 1984, respondent moved interstate an outdoor household article from Mahwah, New Jersey, a gypsy moth high risk area, to Danville, California.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order will be issued.

ORDER

The respondents are assessed a civil penalty of two hundred fifty dollars (\$250.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 12th and Independence Ave., S.W., Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: IAN ALVARADO. P.Q. Docket No. 37. Order issued August 27, 1985.

Decision by Edward H. McGrail, Administrative Law Judge.

ORDER GRANTING MOTION TO DISMISS

By motion filed August 26, 1985, Complainant seeks to dismiss without prejudice the complaint filed December 12, 1984, on the grounds that the Respondent cannot be located for service. For good cause shown, **IT IS ORDERED**, that the complaint issued December 12, 1984, be dismissed without prejudice.

In re: HARRINGTON SHIP AGENCIES, INC. P.Q. Docket No. 108. Order issued August 29, 1985.

Decision by John A. Campbell, Administrative Law Judge.

ORDER GRANTING MOTION TO DISMISS

For good cause shown, Complainant's motion to dismiss the complaint in this proceeding is **granted**.

In re: ISLAND WORLD WIDE SHIPPING. P.Q. Docket No. 53. Order issued August 30, 1985.

Decision by John A. Campbell, Administrative Law Judge.

ORDER GRANTING MOTION TO DISMISS

For good cause shown, complainant's motion to dismiss the complaint in this proceeding is **granted**.

In re: WESTERN AIRLINES. P.Q. Docket No. 113. Order issued August 30, 1985.

Decision by Edward H. McGrail, Administrative Law Judge.

ORDER GRANTING MOTION TO DISMISS

By motion filed August 30, 1985, Complainant seeks to dismiss the complaint in this matter for the reason that prosecution is no longer warranted to effectuate the purposes of the program. For

good cause shown, *IT IS ORDERED*, that the complaint filed in this matter on June 27, 1985, be, and hereby is, dismissed.

In re: MEDITERANSKA PLOVIDBA. P.Q. Docket No. 106. Decided August 22, 1985.

Foreign origin garbage aboard vessel—Civil penalty—Consent.

Kevin Thiemann, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*), and the Act of August 20, 1912, as amended (7 U.S.C. §§ 151–164a and 167) (Acts), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Mediteranska Plovidba, respondent, violated the Acts and regulations promulgated thereunder (7 CFR § 330.100 *et seq.* and 9 CFR § 94.5 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Mediteranska Plovidba, respondent, is a company whose address is Korcula, Yugoslavia, and who is the owner of the ship M/V Mediteran Frigo.

2. Mediteranska Plovidba's agent for the purpose of service of process is Norton, Lilly and Company, Inc., Public Ledger Building 262, Philadelphia, Pennsylvania 19106.

3. On or about February 9, 1985, the M/V Mediteran Frigo arrived in Wilmington, Delaware after being in Yugoslavia and Brazil with foreign origin garbage on board.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred fifty U.S. dollars (\$250.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 14th and Independence Ave., S.W., Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

JULY-AUGUST 1985

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